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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 59.

CHARLES K. OFFIELD, PLAINTIFF IN ERROR,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

FILED JUNE 24, 1905.

(19,816.)

(19,816.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 314.

CHARLES K. OFFIELD, PLAINTIFF IN ERROR,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of errors of the State of Connecticut, Greeting:

[Seal of Circuit Court, Connecticut.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said the supreme court of errors of the State of Connecticut before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The New York, New Haven and Hartford Railroad Company, a corporation organized and existing under and by virtue of the *court* of the State of Connecticut, and located and having its principal place of business in New Haven in the State of Connecticut, and Charles K. Offield of Chicago, Cook county in the State of Illinois, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of

2 the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Charles K. Offield as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the fifth day of June, in the year of our Lord one thousand nine hundred and five.

E. E. MARVIN,
Clerk of the Circuit Court of the United States
for the District of Connecticut.

Allowed by—
DAVID TORRANCE,
Chief Justice of the Supreme Court of Errors
of the State of Connecticut.

3 [Endorsed:] Charles K. Offield plaintiff in error vs. The New York, New Haven and Hartford Railroad Company defendant in error Writ of error from Supreme Court of the United States to supreme court of errors of the State of Connecticut. Charles K. Bush Edward H. Rogers, att'ys for plaintiff in error. State of Connecticut county of New Haven *ss:* June 1905. Then and there I received a copy of the within writ for the adverse party. Edward A. Anketell, clerk of the supreme court of errors of the State of Connecticut for the third judicial district.

STATE OF CONNECTICUT, }
New Haven County, } *ss:*

NEW HAVEN, June 6th, 1905.

Then and there I served the within writ of error by lodging a copy thereof for the adverse party, in the office of the clerk of the supreme court of errors of the State of Connecticut for the third judicial district which is the clerk's office where the record remains within sixty days, Sunday exclusive, after the rendition of the judgment complained of.

Attest: J. PETER DEJON,
An Indifferent Person.

Sworn to before me this 6th day of June 1905.

[Seal of George E. Hall, Notary Public, New Haven, Conn.]

GEORGE E. HALL,
Notary Public.

4 UNITED STATES OF AMERICA, *ss:*

To the New York, New Haven and Hartford Railroad Company, a corporation organized and existing under and by virtue of the laws of the State of Connecticut, and located and having its principal place of business in New Haven, in the State of Connecticut, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the supreme court of errors of the State of Connecticut, wherein Charles K. Offield, of Chicago, county of Cook and State of Illinois, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable David Torrance, chief justice of the supreme court of errors of the State of Connecticut, this sixth day of June, in the year of our Lord one thousand nine hundred and five.

DAVID TORRANCE,
Chief Justice of the Supreme Court of Errors
of the State of Connecticut.

5 [Endorsed:] Charles K. Offield, plaintiff in error, vs. The New York, New Haven and Hartford Railroad Company, defendant in error. Writ of error from the Supreme Court of the United States to the supreme court of errors of the State of Connecticut. Citation. Charles K. Bush, Edward H. Rogers, attorneys for plaintiff in error.

On this 6th day of June, in the year of our Lord one thousand nine hundred and five, personally appeared J. Peter Dejon before me, the subscriber, Jacob B. Ullman, a notary public, and makes oath that he delivered a true copy of the within citation to John G. Parker, the secretary of the said The New York, New Haven and Hartford Railroad Company, at New Haven in the State of Connecticut on the 6th day of June, 1905

And on said 6th day of June, 1905, he also delivered a like true copy of the within citation to George D. Watrous the attorney of said New York, New Haven and Hartford Railroad Company at said New Haven.

J. PETER DEJON,
An Indifferent Person.

Sworn to and subscribed the 6th day of June, A. D. 1905.

[Seal of Jacob B. Ullman, Notary Public, New Haven, Conn.]

JACOB B. ULLMAN,
Notary Public.

6 Supreme Court of Errors of the State of Connecticut, Third Judicial District, April Term, 1905.

NEW YORK, NEW HAVEN AND HARTFORD Railroad Company vs. CHARLES K. OFFIELD.	Defendant's Appeal from Honorable Edwin B. Gager, a Judge of the Superior Court.

To the Honorable Edwin B. Gager, a judge of the superior court of the State of Connecticut:

The application of the New York, New Haven and Hartford Railroad Company, a corporation chartered by the General Assembly of the State of Connecticut, and located at and having its principal office in the city of New Haven, in said State, respectfully represents:

1. That, acting under the authority of the laws of the State of Connecticut, it has acquired more than three-fourths of the capital stock of the New Haven and Derby Railroad Company, a railroad corporation chartered by the General Assembly of this State, and also located at and having its principal place of business in said New Haven, to wit: forty-four hundred and fifty-three (4453) shares of said stock, of the par value of one hundred dollars ($100) each,

out of forty-four hundred and seventy (4470) shares, being the total number of shares of said stock issued and outstanding.

2. That Ricardo F. Armstrong, of the city and county of New Haven, owns ten of said shares, and that it has endeavored to agree, and cannot agree, with said Armstrong for the purchase of said stock.

3. That Charles K. Offield, of the city of Chicago, State of Illinois, owns two of said shares, and that it has endeavored to agree, and cannot agree, with said Offield, for the purchase of said stock.

7 4. That the purchase of the shares of said Armstrong and said Offield respectively by your applicant will be for the public interest.

Your applicant prays for a finding that such purchase will be for the public interest, and for the appointment of three appraisers, who shall estimate the damage to said Armstrong and said Offield respectively, by reason of the taking of their shares of stock in said railroad company respectively; and an order that reasonable notice of this application shall be given to said Armstrong and said Offield, all in pursuance of the statutes in such case made and provided.

Dated at New Haven, this 27th day of January, A. D. 1904.

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY,
By WATROUS & DAY, Its Attorneys.

8 Order of Notice.

Ordered, that the within and foregoing application be heard before me at the superior court room at the court house in New Haven, Connecticut, on the first Tuesday of March, 1904, at ten o'clock in the forenoon, and that notice thereof be given to the said Ricardo F. Armstrong by some proper officer or indifferent person, by leaving with or at the usual place of abode of said Ricardo F. Armstrong a true and attested copy of said application and of this order; and to the said Charles K. Offield by some proper officer or indifferent person, by depositing in the post office at New Haven, Connecticut, a true and attested copy of said application and of this order, addressed to Charles K. Offield, Monadnock building, Chicago, Illinois, which said copy shall be sent by registered mail, postage prepaid; and that each service be made on or before the 15th day of February, A. D. 1904.

Dated at New Haven, Conn. this 27th day of January, 1904.

EDWIN B. GAGER,
A Judge of the Superior Court.

9 NEW HAVEN COUNTY, *ss:*

NEW HAVEN, February 5th, 1904.

Then and there I deposited in the post office, in the city of New Haven, postage paid and registered, a true and attested copy of this

application and order, directed to Charles K. Offield, Monadnock building, Chicago, Ill., and on said 5th day of February, 1904, I placed a like true and attested copy of this application and order in the hands of the within named Ricardo F. Armstrong, in the town of New Haven.

Attest: WILLIAM E. HIGGINS,
Deputy Sheriff.

Fees.

Travel	.60
Service	.24
Copies	2.00
Endorsements	.48
Postage	.10
Clerk fee	3.00
	6.42

(Endorsement:) *Coram*, Hon. Edwin B. Gager, superior court. The New York, New Haven and Hartford Railroad Company's application. Watrous & Day, attorneys.

10 Before the Hon. Edwin B. Gager, of and in the Superior Court of the State of Connecticut.

NEW YORK, NEW HAVEN AND HARTFORD Railroad Company, Corporation, etc.,
vs.
CHARLES K. OFFIELD ET AL.

Petition for Removal to the Circuit Court of the United States for the District of Connecticut.

To the Honorable Edwin B. Gager, a judge of the superior court of the State of Connecticut:

Your petitioner, Charles K. Offield, respectfully represents that the matter in dispute in this cause as to the property rights of your petitioner, exceeds, exclusive of interest and costs, the sum or value of two thousand dollars ($2,000.00), and that this petition is filed prior to the time, or at the time, the defendant is required by the laws of the State of Connecticut, or by the rules of this court, to answer or plead to the declaration, application or complaint filed herein.

That this is a suit of a civil nature, between the New York, New Haven & Hartford Railroad Company, a corporation, chartered by the General Assembly of the State of Connecticut and located at and having its principal office in the city of New Haven in said State, and a citizen of said State, and your petitioner, Charles K. Offield, who was at the commencement of this action and suit, and still is a citizen of the State of Illinois, residing at the city of Chicago in the county of Cook and State of Illinois.

11 Your petitioner has made, and herewith files a bond with good and sufficient surety, for his entering in the said circuit court for the district of Connecticut aforesaid on the first day of its next session or term, a copy of the record in this suit, and for paying all costs that may be awarded by the said circuit court, if said court shall hold this suit was wrongfully or improperly removed thereto.

Your petitioner prays this honorable court or judge to proceed no further herein, except to make the order of removal required by law, and to accept the said surety and bond, and to cause the record herein to be removed into said circuit court of the United States for the district of Connecticut; and he will ever pray, etc.

CHARLES K. OFFIELD, Petitioner.

CHARLES K. BUSH,
OFFIELD, TOWLE, LINTHICUM,
Sols. and of Counsel for Defendant, Charles K. Offield.

STATE OF CONNECTICUT, } ss:
County of New Haven, }

Charles K. Offield being first duly sworn, says he is the petitioner defendant in the above entitled cause, and that the statements and allegations contained in the foregoing petition are true to the best of his knowledge, information and belief.

CHARLES K. OFFIELD.

Subscribed and sworn to before me, this 19th day of February, 1904.

CHARLES K. BUSH,
Commissioner of the Superior Court
for New Haven County.

12 Know all men by these presents, that we, Charles K. Offield, as principal, and Charles K. Bush, as surety, are held and firmly bound unto the New York, New Haven and Hartford Railroad Company in the penal sum of five hundred dollars ($500.00), the payment whereof well and truly to be made unto the said New York, New Haven and Hartford Railroad Company, its representatives and assigns, we bind ourselves, our heirs, representatives, successors and assigns, jointly and severally firmly by these presents.

Whereas, Charles K. Offield has filed his petition in the superior court of the State of Connecticut and before the Honorable Edwin B. Gager, judge of said court, asking for a removal to the circuit court of the United States in and for the district of Connecticut, of a certain cause or suit wherein The New York, New Haven and Hartford Railroad Company is applicant or plaintiff, and the said Charles K. Offield a defendant.

Now, the condition of the above obligation is such that if the said Charles K. Offield shall enter in the circuit court of the United

States for the district aforesaid, on the first — of the next session or term, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States, if said court shall hold that said suit was improperly removed thereto, and shall do and perform all acts required by the laws of the United States to be done by him in the removal of the said suit as aforesaid, then this obligation to be void, otherwise to remain in full force and effect.

In witness whereof, the said Charles K. Offield, as principal, and Charles K. Bush as surety, have hereunto affixed their hands and seals respectively, this 19th day of February, 1904.

CHARLES K. OFFIELD. [L. S.]
CHARLES K. BUSH. [L. S.]

13 Before the Hon. Edwin B. Gager, of and in the Superior Court of the State of Connecticut.

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Corporation, etc.,
vs.
CHARLES K. OFFIELD ET AL.

To Messrs. Watrous & Day, attorneys for appellant:

You are hereby notified that we will, on the 1st day of March, A. D. 1904, at the hour of 10 o'clock, a. m., or as soon thereafter as counsel can be heard, before his honor, Judge Edwin B. Gager, present the petition and bond of the petitioning defendant, Charles K. Offield, heretofore filed herein, for the removal of the above cause to the United States circuit court in and for the district of Connecticut, a copy of which said petition and bond are herewith handed you for your information, at which time and place you may appear, if you so elect.

CHARLES K. BUSH,
Attorney for Petitioning Defendant.

Received copy of the above notice, and the petition and bond therein referred to, this — day of February, A. D. 1904.

——— ———,
Attorneys for Applicant, Plaintiff.

14 Before Edwin B. Gager, Judge of and in the Superior Court of the State of Connecticut.

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Corporation, etc.,
vs.
CHARLES K. OFFIELD ET AL.

On motion of defendants' attorneys, and on filing petition and bond, it is ordered that this cause be, and is hereby transferred to

the United States circuit court in and for the district of Connecticut, and that the clerk of this court forthwith transmit to said United States circuit court, a full and complete transcript of all papers and pleadings filed in said cause, together with all orders made and entered of record in said cause.

(Endorsements:) New York, New Haven and Hartford Railroad Company vs. Offield, *et al.* Petition for removal to the United States circuit court. Filed March 1, 1904, 10 a. m. Gager, J. Heard on motion to dismiss March 11th and March 19th, 1904, and allowed April 4th, 1904. Gager, J.

15 Before Honorable Edwin B. Gager, a Judge of the Superior Court, New Haven County, 3rd Day of March, 1904.

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY
vs.
CHARLES K. OFFIELD ET AL.

Motion to Strike from the Files.

The applicant moves that the petition of Charles K. Offield, of Chicago, Illinois, for the removal of this cause to the United States circuit court in and for the district of Connecticut, be denied and stricken from the files because:

1. Said cause is not legally removable under and pursuant to the laws of the United States, because it is not a suit of a civil nature of which the United States circuit court has original cognizance.

2. The amount in controversy between the applicant and this defendant is the value of two (2) shares of the capital stock of the New Haven and Derby Railroad Company, of the par value of one hundred dollars ($199) each, and said amount exclusive of interest and costs does not exceed the sum of two thousand dollars ($2000) but is less than three hundred dollars ($300).

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY,
By WATROUS & DAY, Its Attorneys.

(Endorsements:) New York, New Haven and Hartford Railroad Company vs. Charles K. Offield, *et al.* Motion to strike from the files. Filed March 4, 1904. Heard March 11, 1904, 11 a. m., and continued to close of short calendar & is — March 18, 1904. Gager, J. Motion denied April 4th, 1904. Gager, J.

16 Before Honorable Edwin B. Gager, a Judge of the Superior Court, New Haven County, First Day of March, 1904.

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY
vs.
CHARLES K. OFFIELD ET AL.

The name of Riccardo F. Armstrong, of the city and county of New Haven, is hereby dropped as a party defendant herein.

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY,
By WATROUS & DAY, Its Attorneys.

(Endorsements:) New York, New Haven & Hartford Railroad Company vs. Charles K. Offield, *et al.* Amendment dropping Riccardo F. Armstrong as party defendant herein. Filed March 4th, 1904. Gager, J.

17 At a special session of the circuit court of the United States for the district of Connecticut, held at New Haven this 12th day of April, 1904.

Present: The Honorable James P. Platt, judge.

THE NEW YORK, NEW HAVEN AND HARTFORD Railroad Company
vs.
CHARLES K. OFFIELD.
At Law. No. 549.

Plaintiff's motion to remand heretofore heard and submitted to the court for consideration and decision having been fully considered and the opinion of the court having been delivered orally, it is, in accordance with said opinion,

Ordered that said motion be, and the same is, granted, and that this cause be, and the same is, hereby remanded with costs to the Honorable Edwin B. Gager, a judge of the superior court of the State of Connecticut, for further proceedings.

JAMES P. PLATT, Judge.

(Endorsements:) No. 549. Law. The New York, New Haven and Hartford Railroad Company vs. Charles K. Offield. Motion to remand. Filed April 13, 1904 E. E. Marvin, clerk.

18 Honorable Edwin B. Gager, a Judge of the Superior Court.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD CO.
vs.
CHARLES K. OFFIELD.

Motion for More Specific Statement.

In the above entitled cause the defendant moves that the plaintiff be required to amend its complaint by stating specifically:

1. Wherein the purchase of the shares of stock of the defendant, stated in said complaint, will be for the public interest.

2. For what public use the property sought to be purchased will be devoted.

THE DEFENDANT,
By CHARLES K. BUSH,
E. H. ROGERS,
His Attorneys.

(Endorsements:) The New York, New Haven and Hartford Railroad Company vs. Charles K. Offield. Motion for more specific statement. Withdrawn April 2, 1905. Gager, J.

19 Reservation.

Supreme Court of Errors, Third Judicial District, New Haven County, Fourth Tuesday in October, A. D. 1904.

NEW HAVEN COUNTY:

Before Hon. Edwin B. Gager, a Judge of the Superior Court, June 16th, A. D. 1904.

Application of the New York, New Haven and Hartford Railroad Company.

Before Honorable Edwin B. Gager, a Judge of the Superior Court, 16th Day of June, A. D. 1904.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMpany
vs.
CHARLES K. OFFIELD.

Substituted Application.

The application of the New York, New Haven and Hartford Railroad Company, a corporation chartered by the General Assembly of the State of Connecticut, and located at and having its principal

office in the city of New Haven, in said State, respectfully represents:

1. That acting under the authority of the laws of the State of Connecticut it has acquired more than three-fourths of the capital stock of the New Haven and Derby Railroad Company, a railroad corporation chartered by the General Assembly of this State, and also located at and having its principal place of business in said New Haven, to wit: forty-four hundred and sixty-eight (4,468) shares of said stock, of the par value of one hundred dollars ($100) each, out of forty-four hundred and seventy (4,470) shares, being the total number of shares of said stock issued and outstanding.

2. That Charles K. Offield, of the city of Chicago, State of Illinois, owns two of said shares, and that it has endeavored to agree
20 and cannot agree with said Offield for the purchase of said stock.

3. That the railroad of the New Haven and Derby Railroad Company is a single track railroad, with a total mileage of but 16.69 miles, running from New Haven westerly to Derby, and thence to Ansonia, with a branch line from Derby to Huntington.

4. That said railroad alone and independently of its connections is relatively unimportant, and has been leased to the applicant for the period of ninety-nine years from July 1st, 1892, at a rental of four per cent. per annum upon the capital stock during the remainder of said term, together with the payment of taxes, assessments, and interest upon the funded debt.

5. That said railroad connects at its eastern terminus with four important railroads owned or operated by the applicant, to wit: the Northampton division, the Hartford division, the Air Line division, and the Shore Line division of the applicant's railroad system, connecting with Boston, Providence, and all important points in southwestern New England.

6. That said railroad of the New Haven and Derby Railroad Company at its westerly termini connects with the Naugatuck division and the Housatonic division of the applicant's railroad.

7. That said railroad of the New Haven and Derby Railroad Company by reason of its connections aforesaid with the railroads operated by the applicant at either end of its line forms a part of the most important freight trunk line entering New England, and controlled by the applicant; and by reason of its connection with the former Housatonic railroad, now the property of the applicant, it forms with the railroads of the Central New England Railway Company and the New England Railroad Company a through all-rail route
21 between Boston, Providence, New Haven, and the West.

8. This route is the only all-rail route owned or controlled by the applicant, and is the only one which can be depended upon in all weathers and at all times for the movement of freight, in the transportation of which the public has a vital interest, as the other connections of the applicant at Fishkill landing and at Harlem river

are water connections, and traffic is subject to delays in time of extreme cold weather, of fogs, and of floods.

9. To fully develop this through route between Boston, southern New England, and the West, so that the public interest may be in the highest degree subserved thereby, requires that additional tracks should be constructed, and many and extensive improvements be made upon said railroad, involving very great and heavy expenditures.

10. The New Haven and Derby Railroad Company, the par value of whose stock is $447,000, has already a funded indebtedness of $1,280,000, and has neither means nor credit whereby said additional tracks and improvements can be economically built. The applicant as lessee cannot safely expend such sums as are necessary for the full development of said railroad as a part of said through all-rail route, as its interests may be determined, either by forfeiture or by expiration of its term.

11. If the additional tracks and improvements aforesaid can be built upon the credit of the New Haven and Derby Railroad Company at all it can only be by financing said new construction upon less advantageous terms than could be done by the applicant after merger, necessitating higher rates and charges for the service on said railroad, whereas the public interest requires that such charges be reduced to the lowest practicable amounts, as could and
22 would be done in case of merger by the acquisition of all of the stock of said company by the applicant.

12. The defendant by his opposition has defeated the carrying out of the applicant's project for improving the through service aforesaid, and for promoting the public usefulness of said railroad; and for the reasons aforesaid the purchase of the shares of the stock of the said defendant will be for the public interest.

13. The applicant intends after the acquisition of said two shares of stock to make the improvements aforesaid.

Your applicant prays for a finding that such purchase will be for the public interest, and for the appointment of three appraisers, who shall estimate the damage to such Offield by reason of the taking of his shares of stock in said railroad company.

Dated at New Haven, this 16th day of June, A. D. 1904.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
By WATROUS & DAY, Its Attorneys.

(Indorsement:) Filed June 16, 1904. Gager, J.

23 Coram, Honorable Edwin B. Gager, a Judge of the Superior Court.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY
vs.
CHARLES K. OFFIELD.

Demurrer to the Plaintiff's Substituted Application.

The defendant in the above entitled cause demurs to the plaintiff's substituted application, because:

1. It is not alleged and does not appear that the shares of capital stock of the New Haven and Derby Railroad Company therein sought to be taken from the defendant are sought to be taken for the public use.

2. It does not appear that the alleged purposes for which it is sought to obtain said stock constitute a public purpose.

3. It is not alleged and does not appear that said shares of stock if taken from the defendant will be put to any public use.

4 It does not appear wherein it will be for the public interest or benefit that said shares of stock should be taken from the defendant, and purchased by the plaintiff.

5. It does not appear that said shares of stock if taken from the defendant and purchased by the plaintiff will when so taken and purchased be put to such use as the General Assembly of this State has power to authorize or grant.

6. It is not alleged and does not appear that the plaintiff will do anything which will be for the public interest or benefit as the result of the taking of said stock, if it is permitted to take the same.

24 7. It is not alleged and does not appear that the plaintiff intends to do anything which will be for the public interest or benefit as the result of the taking of said stock, if it is permitted to take the same.

8. It does not appear that the defendant's ownership of said stock in any way hinders, obstructs, or interferes with the plaintiff in the carrying out of any work, plan or enterprise which if carried out would be for the public interest or benefit.

9. It does not appear that the taking of said stock would enable the plaintiff to make any of the improvements mentioned in the application, or promote the public usefulness of said railroad by means or in a manner more advantageous to the public, or more for the public interest or benefit than it has now the power to do.

10. It appears that the plaintiff has now power and authority to make all of the improvements mentioned in the application, and to promote the public usefulness of said railroad in a manner and by means as advantageous to the public as it would have after the taking of said stock.

11. It appears that the taking of said stock from the defendant in accordance with the substituted application would be an impairment of the obligation of the contract of lease mentioned in paragraph 4 of said substituted application, and of the defendant's rights in, under, and by virtue of said lease.

12. It appears that the taking of said stock would be an impairment of the contract between the defendant as a stockholder of the New Haven and Derby Railroad Company and said New Haven and Derby Railroad Company.

13. By the charter of the plaintiff corporation and the amendment thereto enacted by the General Assembly of this State
25 the stock of said The New Haven and Derby Railroad Company already acquired by the plaintiff, as alleged in said substituted application, has become merged in the entire capital stock of the plaintiff, and has become an integral part thereof. And the expenditure by the plaintiff of such money as will be necessary to make the improvements mentioned in said substituted application can and must be made by the plaintiff upon its own credit and responsibility, and will under said charter and its amendments be legally chargeable to the capital stock of the plaintiff, and the plaintiff's rights or interest in said expenditure will not be affected by any possible termination of said lease.

14. The statute under and by virtue of which said substituted application is brought is defective, and is insufficient to enable the plaintiff to sustain this action, for the reason that it gives to the applicant after condemnation and purchase full power to use and dispose of the stock condemned and purchased, in such manner as it chooses.

15. Section 3694 of the General Statutes of this State, under and by virtue of which said substituted application is brought, is unconstitutional, illegal and void in that it permits the condemnation and taking of the private property of one person or corporation, without the owner's consent, for the private use of another; in that it does not attach any conditions or restrictions to the use of such property after it has been so condemned and taken; in that it permits an impairment of the obligation of contracts; in that it confers exclusive public privileges upon certain corporations; and in that it is not due process of law.

THE DEFENDANT,
By His Attorneys, CHARLES K. BUSH,
EDWARD H. ROGERS.

(Indorsement:) Filed July 20, 1904. Gager, J. Demurrer overruled pursuant to the advice of the supreme court of errors. Dec. 24, 1904. Gager, J.

26 Before the Honorable Edwin B. Gager, a Judge of the Superior Court, July 22nd, 1905.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY
vs.
CHARLES K. OFFIELD.

Stipulation and Request for Reservation.

It is hereby stipulated and requested that the questions of law arising upon the defendant's demurrer to the plaintiff's substituted application be reserved for the consideration and advice of the supreme court of errors.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
By Its Attorneys, WATROUS & DAY.
CHARLES K. OFFIELD,
By His Attorneys, CHARLES K. BUSH,
EDWARD H. ROGERS.

(Indorsement:) Filed July 22, 1904. Gager, J.

27 Before the Honorable Edwin B. Gager, a Judge of the Superior Court, July 27, 1904.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY
vs.
CHARLES K. OFFIELD.

Reservation.

The above entitled cause came before the undersigned, a judge of the superior court, on the first Tuesday of March, 1904, when all parties appeared, and the plaintiff filed its amendment, dropping the name of Riccardo F. Armstrong as a defendant therein, and thence by continuance to the 21st day of April, 1904, when the defendant filed his demurrer, as on file, and thence to the 16th day of June, 1904, when the applicant filed its substituted application, as on file, and on the 20th day of July, 1904, the applicant filed its amendment to the substituted application, as on file, and on said 20th day of July, 1904, the defendant filed his demurrer to the plaintiff's substituted application, as on file. And pursuant to the stipulation and request for reservation of all the parties to said cause all the questions of law arising upon the defendant's demurrer to the plaintiff's substituted application, and as to what advice shall be given, and to whom, or what judgment should be rendered in said cause, are

hereby reserved for the consideration and advice of the supreme court of errors, to be held at Bridgeport, within and for the third judicial district, on the fourth Tuesday in October, 1904.

EDWIN B. GAGER,
A Judge of the Superior Court.

28 New Haven County, October Term, 1904.

N. Y., N. H. & H. R. R. Co.
v.
OFFIELD.

Application under Gen. Stat., sec. 3694, to procure the condemnation of two shares of stock in the New Haven & Derby R. R. Co., brought before a judge of the superior court (Hon. Edwin B. Gager) and reserved by him on a demurrer to the application for the advice of this court. Advice given that the demurrer be overruled.

29 BALDWIN, J.:

For many years any railroad company of this State has had a statutory right to take a lease of the property or franchise of, or to lease its own property or franchises to any other such company, with whose tracks its own may connect, and no limitation has been prescribed as to the term of the lease, provided it should be approved by a two-thirds vote of the stockholders in each. Gen Stat., secs. 3702, 3703. In 1889 and 1899 the plaintiff was empowered to increase its capital stock until the year 1910, for the purpose of exchanging shares in it (on terms to be approved by a committee consisting of two officers of the State and a lawyer to be appointed by the governor) for shares in the capital stock of any railroad company whose road it might be holding under a lease running for not less than fifty years, or of buying such shares. Until the entire capital stock of any such leased line should be so obtained, such shares as might be obtained were to remain in the plaintiff's control "as its property, the said stock to be used for all purpose of income, corporate organization, management and franchise; but for all other purposes, including purposes of taxation, it shall be deemed to be transferred to and merged into the stock of the New York, New Haven and Hartford Railroad Company, subject, nevertheless, to the right of any proper court to control the undue exercise of such power of voting on said stock for the protection of other stockholders." Should it "retire all of the capital stock of any such leased line, by purchase or exchange, the executive officers of said respective companies shall certify the same by certificate to be filed in the office of the State secretary, and the said stock of said leased line and all its franchises shall thereupon be and be deemed to be forever transferred to and merged in the stock and franchise
30 of the said New York, New Haven and Hartford Railroad Company." X Special Acts, 1298; XIII Special Acts, 41.

Pursuant to the powers thus granted, the plaintiff has taken a lease of the New Haven & Derby railroad for 99 years from July 1, 1892, at a net rental of four per cent. a year on its capital stock, and has acquired 4468 shares of its capital stock, which is divided into 4470 shares of the par value of $100 each. The leased railroad has a mileage of less than seventeen miles, and a funded indebtedness of $1,280,000. It connects at New Haven, on the east, with four, and at its western terminals with two important railroad lines owned by the plaintiff, and forms a link in an all-rail route between Boston and the West which is the only one controlled by the plaintiff, and the only one of any kind controlled by it over which goods can be transported with assured dispatch in all weathers and at all seasons. To develop this route so as best to serve the public interest requires the laying of additional tracks on the New Haven & Derby railroad and other extensive and very costly improvements. The lessor company has neither means nor credit whereby this can be effected on advantageous terms. The plaintiff could and will effect it, and at much less cost, if it can acquire the two outstanding shares of the stock of the lessee. They are owned by the defendant, who refuses to agree on terms of purchase.

It has become the settled policy of this State, evidenced by a long course of legislation, to allow the consolidation of connecting railroad properties under one management. It is for the public interest that railroads should be built in such a manner as to make them most useful to the public. When, to attain that end, large expenditures must be made, it is for the public interest that the requisite funds should be secured by those making the outlay and operating the railroad on such terms and conditions as to impose upon them no unnecessary burden, for whatever that burden is, its weight, by increasing the fixed charges which they must meet, is apt ultimately to fall upon those travelling or forwarding goods over the railroad.

31

The plaintiff's railroad is a great highway for public use. Every improvement upon it furthers the public use, and the more economically it is made, providing it be well made, the more is such use promoted, because it will cost the public less. The charges for railroad transportation must always be reasonable, but in determining what is reasonable, the actual expense of construction is a legitimate subject of consideration. The record shows the credit of the New Haven & Derby Railroad Company to be such that if it could provide the means for the projected improvement of its property at all, it must be by contracting loans at a higher rate of interest than would be paid by the plaintiff for similar assistance.

This being so, the public interest would be better served by having the plaintiff do the work. That it is a necessary work in order to make the railroad of the greatest service to the public is admitted by the demurrer. It will therefore promote the use for which the line was originally constructed. Whatever in the nature of a property interest stands in the way of such promotion the State can put

aside. Any kind of property can be taken for public use on making just compensation. The whole franchise of a corporation may be so taken. Enfield Toll Bridge Co. v. Hartford & New Haven R. R. Co., 17 Conn., 40, 454; Greenwood v. Freight Company, 105 U. S., 13, 22. Its whole property may be likewise taken. Bigelow v. Union Freight R. R. Co., 137 Mass., 478. Shares of stock
32 represent an undivided interest in such franchises and property, and for the same reason can be taken, if to take them seems to the State necessary in furtherance of public uses. Black v. Delaware & Raritan Canal Co. 22 N. J. Eq., 130; 24 N. J. Eq., 455, 468, 484. That the uses to be furthered are public is a question the decision of which by the legislative department, while not absolutely conclusive are the judicial department, on a proceeding like the present, is entitles to very great weight. N. Y., N. H. & H. R. R. Co. v. Long, 69 Conn., 424, 436.

That to take property for the construction of a railroad by a private corporation is to take it for a public use is firmly settled. It is so taken because the public benefit will be promoted by such a railroad. Bradley v. N. Y. & N. H. R. R. Co., 21 Conn., 294, 305. In like manner may it be promoted by improving such a railroad and making it more useful. By taking the defendant's shares of stock the New Haven & Derby Railroad Company, which now survives as a mere shell, will become extinguished, and its franchise will become merged in that of the plaintiff. The General Assembly did not transgress their power in authorizing condemnation proceedings when necessary to brush such a ghost of a corporation out of existence. Its survival can serve no useful purpose; its extinction may facilitate and lessen the cost of the construction and improvements necessary to make the railroad of which it is now the owner fulfil its office to the best effect. Starr Burying Ground Asso. v. North Lane Cemetery Asso., 77 Conn. 88. Under the circumstances of this case, the condemnation of the defendant's two shares of stock is in substance and effect a condemnation of the franchise and property of the company for a public use which it has ceased to serve efficiently.

33 It is contended that if the plaintiff is allowed to take the defendant's shares, it becomes their absolute owner and may sell them as such to private purchasers. Whether such a claim would be entitled to any regard, were the defendant's shares not the only ones now outstanding, we need not inquire. Their acquisition, under the terms of the plaintiff's charter, will, *ipso facto* work a merger, and preclude any possibility of their being applied to a private use.

It is further argued that the statutory permission to maintain an application of this nature is a grant to a set of men of exclusive privileges from the community, and so in violation of our Constitution (art. 1, sec. 1.) The statute is for the benefit of all railroads to which its term may apply. Railroad companies constitute a peculiar class of artificial persons which can properly be invested with

special privileges of a kind calculated to promote the public good. Drouin v. Boston & Maine R. R., 74 Vt., 343; 52 Atlantic, 957.

Nor will the defendant be deprived of property without due process of law. This proceeding is due process. Murray's Lessee v. Hoboken Land and Improvement Co., 18 How., 272.

The claim that the statute impairs the obligation of a contract is equally groundless. When the defendant acquired his shares, he became a member of a corporation charged with a public trust. It has acquired a railroad for public use. It has given a lease of it to the plaintiff, subject to the same trust, for public use. It is the right of the State to do whatever is necessary to secure its being put to the best use in fulfilment of the trust. Gates v. Boston & New York Air Line R. R. Co., 333, 342.

Our advice is that the demurrer be overruled.

No costs will be taxed in this court in favor of either party.

In this opinion the other judges concurred.

34 The foregoing is a true copy of the original opinion as filed with the reporter of the court; but the opinion is subject to alteration and addition by the judges until printed in the official reports.

JAMES P. ANDREWS, Reporter.

(Indorsements:) N. Y. N. H. & H. R. R. Co. v. Offield. New Haven county, Oct. term, 1905. Opinion. Baldwin, J. Superior court, New Haven county, Filed Dec. 24, 1904. Fowler, ass't clerk.

35 At a supreme court of errors held at Bridgeport in and for the third judicial district, on the fourth Tuesday of October, A. D. 1904.

Present: Hon. Davis Torrance, chief justice; Hon. Simeon E. Baldwin, Hon. William Hamersley, Hon. Frederic B. Hall, Hon. Samuel O. Prentice, associate judges.

On Reservation by Hon. Edwin B. Gager, a Judge of the Superior Court.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, a Corporation Located in the Town of New Haven,
vs.
CHARLES K. OFFIELD, of the City of Chicago, in the State of Illinois.

Judgment.

This reservation presenting questions of law which have arisen in the trial of the above entitled case pending before the trial judge as may appear from the certified transcript of record and finding by the said trial judge in said case, on file in this court, was made by the said Edwin B. Gager, a judge of the superior court on the 27th

day of July A. D. 1904, and came to this court at its term held at Bridgeport on the fourth Tuesday in October, A. D. 1904, when the parties appeared and were fully heard.

Whereupon it is considered and adjudged that the said judge be and he is hereby advised as follows: That the demurrer in said case be overruled and that no costs be taxed in this court in favor of either party.

Date of judgment Dec. 16, 1904.

36 By the court.

JOHN S. FOWLER,
Ass't Clerk.

(Endorsement:) The New York, New Haven and Hartford Railroad Company vs. Charles K. Offield. On reservation by Hon. Edwin B. Gager, a judge of the superior court. Judgment.

37 Before Hon. Edwin B. Gager, a Judge of the Superior Court, 19th Day of December, 1904.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY
vs.
CHARLES K. OFFIELD.

(G. 13.)

Motion for Judgment and for Order Appointing Appraisers.

The plaintiff moves for judgment pursuant to advice of the supreme court of errors, and for an order appointing appraisers to estimate the value of the two shares of stock of the New Haven & Derby Railroad Company belonging to the defendant.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY,
By WATROUS & DAY, Its Attorneys.

(Endorsements:) Filed Dec. 19, 1904. Gager, J. Hearing ordered for Friday, Dec. 23, 1904, 11 a. m. Gager, J. Demurrer overruled. Answer ordered on or before Tuesday, Dec. 27, 1904. Hearing on complaint and answer Saturday, Dec. 31, 10 a. m. Gager, J. Continued to Jan. 9, 1905, 10 a. m.

38 NEW HAVEN COUNTY:

Before the Honorable Edwin B. Gager, a Judge of the Superior Court.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY
vs.
CHARLES K. OFFIELD.

Answer to Substituted Application.

First Defense.

1. As to paragraph one the defendant has not any knowledge or information sufficient to form a belief.

2. Paragraphs two, three, four, five and six are admitted.

3. As to paragraphs seven, eight, nine, ten, eleven, twelve and thirteen the defendant has not any knowledge or information sufficient to form a belief.

Second Defense.

1. The plaintiff has now power and authority under its amended charter to make all of the improvements mentioned in the application, and to promote the public usefulness in a manner and by means as advantageous to the public as it would have after the taking of said stock.

A copy of said charter is hereto annexed and marked Exhibit 1.

THE DEFENDANT,
By C. E. BUSH,
E. H. ROGERS,
His Attorneys.

(Endorsement:) Filed Dec. 27, 1904. Gager, J.

39 EXHIBIT 1 TO SECOND DEFENSE.

(G. 16.)

Amending the Charter of The New York, New Haven and Hartford Railroad Company.

SECTION 1. The New York, New Haven and Hartford Railroad Company is hereby authorized to increase its capital stock to such extent as shall be required, from time to time, either by purchase or payment, to take up its funded and floating debt, as the same shall be at the date of the acceptance of this amendment, and to make permanent additions and improvements in the property of the company and of its leased lines. But no issue of stock for the aforesaid

purposes shall be made except upon the payment of one hundred dollars in cash for each share so to be issued; and the cost of such additions and improvements shall be verified by sworn certificate of an engineer approved by the board of railroad commissioners, and the certificates shall be filed with said board.

SEC. 2. Said company may also increase its capital stock for the purpose of exchanging the same, up to and during the year 1899, for the shares of the capital stock and for the obligations of any railroad company whose property it may hold by virtue of a lease for a term as long as fifty years, and, in case of roads to be leased hereafter, whose railroad is located in whole or in part within this State. But no such exchange of new stock of the company for the stock or obligations of a company whose property may be so held by it shall be made until the terms of said exchange, in the case of each and all such companies, are approved by a committee consisting of the State treasurer, State comptroller, and a counselor at law of at least ten years' practice to be appointed by the governor, upon the application of the New York, New Haven and Hartford Railroad Company; and twenty days' notice of such application, and of the proposed exchange and its terms shall in all cases be given to the board of railroad commissioners; and said railroad commissioners are hereby authorized to appear upon the hearing of such applications, and of any of them, and to make any and all objections and suggestions relative to such exchange as may seem proper to them in the interest of any party concerned, or of the public. And such committee is authorized to alter, amend, and change any and all proposed methods and terms of exchange, and to approve the same as they shall amend them; and after said plan and method in any case is approved by such committee, the holder of any stock or obligations proposed to be exchanged and the said New York, New Haven, and Hartford Railroad Company are hereby authorized to make such exchange; but the amount of new stock to be issued in exchange for the stock of said leased lines, or by purchase of said stock of said leased lines, as hereinafter provided, shall not exceed the whole amount of capital stock of said lines now issued under their charters, or now authorized by law.

SEC. 3. In case the said New York, New Haven, and Hartford Railroad Company shall retire all of the capital stock of any such leased lines, by purchasing or exchange, the executive officers of said respective companies shall certify the same by certificate, to be filed in the office of the State secretary, and the said stock of said leased line and all its franchises shall thereupon be and be deemed to be forever transferred to and merged in the stock and franchises of the said New York, New Haven and Hartford Railroad Company; and the note-, bonds, and debts of said leased lines so far as they are not retired by said New York, New Haven and Hartford Railroad Company, shall be binding upon the said New York, New Haven and Hartford Railroad Company, and the duties, obligations,

and privileges of said leased lines, as given and expressed by their respective charters, shall be and remain upon and with the said New York, New Haven and Hartford Railroad Company. Until the entire capital stock of any of said leased lines is so obtained by said New York, New Haven and Railroad Company by purchase or exchange of stock, the shares of capital stock of any of said leased lines which are so obtained shall remain in the control of the New York, New Haven and Hartford Railroad Company as its property, the said stock to be used for all purposes of income, corporate organization, management, and franchise; but for other purposes, including purposes of taxation, it shall be deemed to be transferred to and merged into the stock of the New York, New Haven and Hartford Railroad Company, subject nevertheless, to the right of any proper court to control the undue exercise of such power of voting on said stock for the protection of other stockholders, and the said obligations shall remain as good and valid obligations of said several leased lines under the terms of the respective leases. The said New York, New Haven and Hartford Railroad Company may pay at maturity the obligations of said leased line companies, and may also, until and including the year 1899, purchase the obligations and shares of capital stock of said leased lines, and for the aforesaid purposes may issue capital stock, each share of such new capital stock to be paid for by one hundred dollars in cash. Any such obligations of said leased lines so paid by the New York, New Haven and Hartford Railroad Company shall be and remain a valid obligation against said leased line company under the terms of the lease
42 in determining whether at any time proper and equal facilities are afforded to all connecting roads, agreeable to the provisions of section seven of the act authorizing the formation of the New York, New Haven, and Hartford Railroad Company, printed in the public acts of 1871, p. 713, in so much of said section as provides that said company shall ticket passengers, check baggage, way-bill freight, and give equal facilities for the convenient transfer of passengers, baggage, and freight to and from all connecting railroads, every railroad now or hereafter connected with the railroad of said company, and whose stock and franchises shall hereafter be merged into the stock and franchises of the New York, New Haven, and Hartford Railroad Company under the provisions of this act shall be deemed a connecting railroad within the meaning of said act.

SEC. 4. The new capital stock hereby authorized, excepting that which is used and exchanged for capital stock or obligation of leased lines, shall be first offered to the stockholders for subscription in proportion to the number of shares held at the time of increase, excepting that the directors may arrange for the disposition of fractional shares; and stockholders holding shares in any trust capacity may subscribe for new stock, unless expressly prohibited by the terms of their trust. Such shares of new stock as are not taken by shareholders may be sold at public auction for the benefit of the company; but no shares shall be sold at less than par.

SEC. 5. The entire amount of capital stock hereby authorized shall not exceed thirty-five million dollars.

SEC. 6. This amendment may be accepted by a two-thirds vote at a stockholders' meeting held for the purpose.

Approved June 15, 1889.

43 Extending Time for the Exchange of Stock of the New York, New Haven and Hartford Railroad Company.

Resolved by this assembly: That all the provisions of section two of a resolution of the General Assembly amending the charter of the New York, New Haven, and Hartford Railroad Company, approved June 14, 1889, for increasing the capital stock of said company for the purpose of exchanging the same for the shares of the capital stock and the obligations of other railroad companies, are hereby extended to and during the year 1910.

Approved March 15, 1899.

(Endorsement:) Filed Dec. 31, 1904 by consent. Gager, J.

44 NEW HAVEN COUNTY:

Before the Honorable Edwin B. Gager, a Judge of the Superior Court, December thirtieth, 1904.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY
vs.
CHARLES K. OFFIELD.

(G. 15.)

Plaintiff's Demurrer to Second Defense to Substituted Application.

The plaintiff demurs to said defense because:

1. It consists of an allegation of law, and not of fact.
2. It is immaterial and irrelevant.
3. It does not appear that said improvements, if made by the applicant pursuant to the authority set up in said defense, would not necessarily be made by the applicant at its own expense upon the real property of the New Haven and Derby Railroad Company, and would not thereupon become the property of said New Haven and Derby Railroad Company, and that in this event, in order to prevent the loss of money so expended by the applicant, higher rates and charges to the public would not be necessary than if the defendant's stock should be acquired by the applicant.

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY,
By HENRY H. TOWNSEND &
WATROUS & DAY, Its Attorneys.

(Endorsement:) Filed Dec. 31, 1904. Gager J. Refiled by consent after amendment, Ex. 1 to second defense. Gager, J. Demurrer sustained Jan. 9, 1905. Gager, J.

45 NEW HAVEN COUNTY:

Before the Honorable Edwin B. Gager, a Judge of the Superior Court, the 9th Day of January, A. D. 1905.

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, a Corporation Organized Under the Laws of the State of Connecticut and located at New Haven, in said State,
vs.
CHARLES K. OFFIELD, of the City of Chicago, State of Illinois.

(G. 17.)

Finding and Judgment.

The above entitled cause came before the undersigned, a judge of the superior court, on the first Tuesday of March, 1904, when both the parties appeared, and the plaintiff filed its amendment, dropping the name of Ricardo F. Armstrong as a defendant therein, and thence by continuance to the 21st day of April, 1904, when the defendant filed his demurrer, as on file, and thence to the 16th day of June, 1904, when the applicant filed its substituted application, as on file; and on the 20th day of July, 1904 the applicant filed its amendment to the substituted application, as on file. And on said 20th day of July, 1904, the defendant filed his demurrer to the plaintiff's substituted application, as on file. Thereupon said cause was duly reserved for the advice of the supreme court of errors to be held at Bridgeport, within and for the third judicial district, on the fourth Tuesday in October, 1904; and on the 16th day of December, 1904 said supreme court advised that the demurrer to the substituted application be overruled; and on December 23d on the motion of the plaintiff and pursuant to said advice said demurrer was overruled by me. Whereupon an order was passed that the defend-
46 ant plead over, if he so desired, on or before December 27th, 1904. Whereupon the defendant filed his answer, as on file, and the plaintiff filed its demurrer to the second defense, as on file, thereupon said cause was continued to December 31, 1904, when the parties appeared by their counsel and witnesses, and were duly heard upon the issues, as on file. The defendant with the consent of court and counsel amended his second defense by annexing thereto as Exhibit 1 a copy of the resolution of the General Assembly of the State of Connecticut entitled, "Amending the charter of the New York, New Haven & Hartford Railroad Company, ap-

proved June 14, 1889, and by consent of court and counsel the demurrer of the applicant was deemed refiled thereto.

At said hearing the applicant, for the purpose of proving allegation 13 of the substituted application, offered the testimony of Charles S. Mellen, president of the New York, New Haven, & Hartford Railroad Company, to the effect that it was the intention of said company to make the improvements aforesaid. To this evidence the defendant objected because it did not appear that the board of directors of said company had passed a vote authorizing the making of said improvements. Thereupon the witness testified that the directors had passed a vote authorizing the expenditure, under his supervision, of about two hundred and seventy-five thousand dollars ($275,000), for the purpose of double tracking and improving a portion of the road of the New Haven & Derby Railroad Company lying between the Derby Junction and the westerly terminus of said road in the town of Huntington and that contracts had been made therefor, and the work was now in progress; that the necessities of the company for the development of said
47 route were such that the applicant could not await the termination of this suit, but itself undertook the execution of said work. Whereupon witness was again asked whether or not it was the intention of the applicant, in case of the acquisition of the defendant's two shares of stock, to make the improvements which were described. The witness re- that it was. The defendant objected to said question, and I admitted the same, to which ruling the defendant duly excepted.

After said ruling and the answer to the same it further appeared in the course of the examination of the witness, and I find, that the distance from the point in the town of Huntington to Derby Junction upon which the work of double tracking is now in progress, is 3.79 miles. At Derby Junction a connection is made with the Naugatuck division of the plaintiff's road, which from said Derby Junction furnishes an all-rail double track line via Naugatuck Junction to New Haven, a distance of between 21 and 22 miles. The distance from Derby Junction to New Haven over the New Haven and Derby road, upon which the plaintiff intends to make the improvements described in the application, is between 10 and 11 miles. No other evidence was offered by the plaintiff of its corporate intention to make said intended improvements than the testimony of said witness, and no evidence was offered in opposition to the testimony of said witness; and said witness testified fully as to all of the facts alleged in the application which were denied by the defendant. At the conclusion of said testimony an adjournment was taken to this 9th day of January, 1905.

At said hearing the demurrer to the second defense was sustained, the defendant refused to plead over, and all the allegations of the substituted application are found to be true; and it is further
48 found that the purchase of defendant's stock will be for the public interest, and that an order should be passed for the

appointment of three appraisers, who shall estimate the damage to said defendant by reason of the taking of his shares of stock in said New Haven & Derby Railroad Company. It is therefore

Ordered, that Samuel H. Fisher, Earlliss P. Arvine, and Charles W. Scranton all of New Haven, be and they hereby are appointed appraisers to estimate all the damages that may arise to Charles K. Offield from the taking and purchasing of two shares of stock of the New Haven & Derby Railroad Company pursuant to the foregoing finding, who shall be sworn, and give reasonable notice to the parties hereto in regard to the time of making such estimate, and return an appraisal thereof in writing under their hands, to the clerk of the superior court in and for New Haven county, by whom said appraisal shall be recorded, all in accordance with the provisions of section 3687 of the General Statutes of Connecticut, revision of 1902.

The defendant claimed and asked for a ruling that the statute authorizing condemnation of his stock by the plaintiff, and the appointment of appraisers, was a violation of article 1, section 10 of the Constitution of the United States, prohibiting a State from passing any law impairing the obligation of contracts, and of article V in addition to and in amendment of the Constitution of the United States, providing that no person shall be deprived of his property without due process of law, nor shall private property be taken for public use without just compensation, and that upon the foregoing facts said order was in violation of said provisions of the Constitution of the United States, each and all of which claims were overruled, the defendant duly excepting.

EDWIN B. GAGER,
A Judge of the Superior Court.

49 From this judgment the defendant appeals to the supreme court of errors, at its next term to be held at New Haven, in and for the third judicial district, on the third Tuesday in January, A. D. 1903; and Charles K. Bush, Esq., of Orange, is recognized in the sum of $100, conditioned that the said defendant shall prosecute said appeal to effect, and pay all costs therein if he shall fail so to do.

50 Before the Honorable Edwin B. Gager, a Judge of the Superior Court, January 14, 1905.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD Company
vs.
CHARLES K. OFFIELD.

(G. 18.)

Notice of Appeal.

Notice is hereby given that the defendant in the above entitled cause appeals to the next term of the supreme court of errors, to be held at New Haven, within and for the third judicial district, on the third Tuesday of January, 1905.

CHARLES K. OFFIELD,
By His Attorneys, CHARLES K. BUSH,
EDWARD H. ROGERS.

(Indorsement:) Filed Jan. 14, 1905. Gager, J.

51 NEW HAVEN COUNTY:

Before the Honorable Edwin B. Gager, a Judge of the Superior Court.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD Company
vs.
CHARLES K. OFFIELD.

(G. 19.)

Appeal.

The defendant appeals from the finding and order of said Honorable Edwin B. Gager, a judge of the superior court, to the supreme court of errors, to be held at New Haven, within and for the third judicial district, on the third Tuesday of January, A. D. 1905, for the revision of errors which he claims to have occurred in the hearing before said Honorable Edwin B. Gager; and for reasons of said appeal the defendant assigns the following:

1. Said Honorable Edwin B. Gager erred in overruling the demurrer to the complaint on file.

2. Said Honorable Edwin B. Gager erred in sustaining the plaintiff's demurrer to the defendant's second defense, as on file.

3. Said Honorable Edwin B. Gager erred in admitting the testimony of Charles S. Mellen, the president of the applicant corporation, that it was the intention of the applicant to double track the portion of the New Haven and Derby Railroad Company from Derby Junction to New Haven.

4. Said Honorable Edwin B. Gager erred in finding that it was the intention of the applicant corporation to make the improve-
52 ments described in the complaint, without any other evidence of the applicant's intention than the said testimony of said Charles S. Mellen.

5. Said Honorable Edwin B. Gager erred in holding that the purpose for which the plaintiff seeks to obtain the stock is a public use, and that upon the facts alleged and proved the purchase of defendant's stock will be for the public interest.

6. Said Honorable Edwin B. Gager erred in overruling the defendant's claim that the statute authorizing the condemnation of defendant's stock is in violation of article 1, section 10 of the Constitution of the United States, prohibiting a State from passing any law impairing the obligation of contracts, and that said order is in violation of said constitutional provision.

7. Said Honorable Edwin B. Gager erred in overruling the defendant's claim that said statute authorizing the condemnation of defendant's stock is in violation of article V in addition to an amendment of the Constitution of the United States, providing that no person shall be deprived of his property without due process of law, nor shall any private property be taken for public use without just compensation, and that said order was in violation of said constitutional provision.

The defendant therefore prays for such relief as is provided by law in the premises.

The Defendant, CHARLES K. OFFIELD,
By CHARLES K. BUSH,
EDWARD H. ROGERS,
His Attorneys.

53 I certify that the foregoing appeal was filed on the 14th day of January, 1905; and that Charles K. Bush, Esq., of Orange, is recognized in the sum of $100, conditioned that the said Charles K. Offield shall prosecute said appeal to effect, and pay all costs therein if he fail to do so.

Said appeal is hereby allowed.

EDWIN B. GAGER,
A Judge of the Superior Court.

54 Before Hon. Edwin B. Gager, a Judge of the Superior Court.

APPLICATION OF THE NEW YORK, NEW HAVEN AND HARTFORD Railroad Company
vs.
CHARLES K. OFFIELD.

Certification of Record.

I hereby certify that the within documents marked at the top "G. 1" to "G. 19", inclusive, are the original records, and together constitute the original file in the above entitled cause.
Jan. 14, 1905.

EDWIN S. GAGER,
A Judge of the Superior Court.

Supreme Court of Errors, Fairfield County.

CLERK'S OFFICE.

The above and foregoing is a true copy of the record in said case to be used in the trial in the supreme court of errors.
Attest:

WILLIAM A. SHELTON, Clerk.

55 New Haven County, April Term, 1905.

N. Y., N. H. & H. R. R. Co.
v.
OFFIELD.

Application to Hon. Edwin B. Gager, a judge of the superior court, for the appointment of appraisers of two shares of the stock of the New Haven & Derby R. R. Co., owned by defendant. A demurrer to the application having been overruled, pursuant to the advice of this court (77 Conn., 417), an answer was filed, containing two defences. A demurrer to the second defence was sustained, and upon a hearing on the first a judgment was rendered as claimed, for which this appeal was taken. *No error.*

56 BALDWIN, J.:

The second defence in the defendant's answer was that the plaintiff already had, under certain amendments to its charter which were set forth at length, power to do all that it proposed, by means as advantageous to the public as it would have, should it take the defendant's shares of stock. As courts take judicial notice of all the private acts of this State, and as the judge of the superior court, in

dealing with this cause, was exercising part of the judicial powers of that court, this defense presented a mere question of law, already disposed of in accordance with our advice; and the demurrer to it was properly sustained. Gen. Stat., sec. 697; New Milford Water Co. v. Watson, 75 Conn., 237.

Upon the hearing on the questions of fact raised by the first defence, it appeared that the directors of the plaintiff company had voted to authorize the expenditure of $275,000, under the supervision of its president, for improving and double tracking about four miles of the New Haven & Derby railroad, next west of the intersection of that railroad with the Naugatuck division of the plaintiff's railroad; that from this intersection to New Haven by way of the Naugatuck division was over twenty-one miles, and by way of the New Haven & Derby railroad less than eleven miles; and that the work under the vote was already under contract and in progress. The president of the company testified that it was its intention to make all the improvements described in the application as proposed, in case of the acquisition of the defendant's stock; and that it had begun the work on the tracks lying west of the Naugatuck division because the necessity for such improvements there was so great that the company could not wait till these two shares had been acquired.

There was no error in the admission of this evidence. It was
57 necessary to show a recorded vote of the directors authorizing the execution of the entire improvements contemplated, in case of the acquisition of the stock in controversy. The president of a railroad corporation may well be sufficiently acquainted with the policy and plans of its directors to testify in regard to them, although they may never have been made the subject of formal action. The rule as to parol evidence of a corporate intent inconsistent with action which has been taken and is on record has no application to parol evidence as to a corporate intent respecting action to be taken in the future.

In the case at bar it did not appear that the directors of the plaintiff had passed any vote relating to the subject in hand, except that above mentioned, and no evidence was offered in opposition to the testimony of the president.

The proofs submitted have satisfied the judge of the superior court that the statements in the application were true, he properly found that the acquisition of the defendant's stock will be for the public interest, and proceeded, notwithstanding the objections of the defendant, to appoint appraisers. N. Y., N. H. & H. R. R. Co. v. Offield, 77 Conn., 417.

It is contended that the plaintiff was bound to show that the board of directors had voted both to make all the improvements described in the application, and to take for that purpose the defendant's stock. The absence of allegations to that effect in the application was not made a ground of demurrer, nor was this point made at any stage of the cause before the judge of the superior court. It is therefore unnecessary to consider it here.

There is no error.

(Indorsement:) N. Y., N. H. & H. R. R. Co. v. Offield. New Haven county, Apr. term, 1905. Opinion, Baldwin, J.

58 The foregoing is a true copy of the original opinion as filed with the reporter of the court; but the opinion is subject to alteration and addition until printed in the official reports.

JAMES P. ANDREWS, Reporter.

(Indorsements:) Superior court, New Haven county. Filed May 16, 1905. Fowler, ass't clerk.

59 At a supreme court of errors held at Bridgeport in and for the third judicial district, on the second Tuesday of April, A. D. 1905.

Present Hon. David Torrance, chief justice. Hon. Simeon E. Baldwin, Hon William Hamersley, Hon. Frederic B. Hall, Hon. Samuel O. Prentice, associate judges.

THE NEW YORK, NEW HAVEN AND HARTFORD Railroad Company, a Corporation Located in the Town of New Haven,
vs.
CHARLES K. OFFIELD, of the City of Chicago, in the State of Illinois.

On Appeal from the Judgment of Hon. Edwin B. Gager, a Judge of the Superior Court.

Judgment.

This appeal by the defendant claiming error in the process, record, and judgment, and in the proceedings and decisions of the Hon. Edwin B. Gager, a judge of the superior court, on questions of law arising in the trial, as may appear in the certified transcript of record and finding of facts on file in this court was allowed by the said Edwin B. Gager, a judge of the superior court, on the 14th day of January, A. D. 1905, and came to this court at its term held at New Haven on the third Tuesday in January A. D. 1905, and then by continuance to the present term of this court when the parties appeared and were fully heard.

And now this court finds that in the record, judgment, and proceedings of said Edwin B. Gager, a judge of the superior court, there is no error.

It is therefore considered and adjudged that the said judgment be affirmed and established, and that the plaintiff recover of
60 the defendant its costs taxed at $—.

Date of judgment May 12, 1905.

By the court:

JOHN S. FOWLER, Ass't Clerk.

(Indorsement:) The New York, New Haven and Hartford Rail Road Company vs. Charles K. Offield. On appeal from judgment of Hon. Edwin B. Gager, a judge of the superior court. Judgment.

61 In the Supreme Court of the United States and in the Supreme Court of Errors of the State of Connecticut.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Defendant in Error,
vs.
CHARLES K. OFFIELD, Plaintiff in Error.

Petition for Writ of Error.

To the Honorable David Torrance, chief justice of the supreme court of errors of the State of Connecticut:

And now comes Charles K. Offield, the defendant in the above entitled cause, and showeth that on or about the 12th day of May, 1905, the supreme court of errors of the State of Connecticut made and entered a final judgment and order in the above entitled cause in favor — the said The New York, New Haven and Hartford Railroad Company and against the said Charles K. Offield, in which final judgment and order and the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of the said Charles K. Offield, all of which will more in detail appear from the assignment of errors which is filed with this petition. The opinions of said supreme court of errors are hereto attached and made parts hereof. The amount in dispute exclusive of interest and costs exceeds $2000.

That the said supreme court of errors of the State of Connecticut is the highest court of the said State of Connecticut in which a decision in this suit and this matter could be had. Wherefore said Charles K. Offield petitions and prays that a writ of error from the Supreme Court of the United States may issue in his behalf
62 to the supreme court of errors of the State of Connecticut, for the correction of errors complained of, for the reasons specified in the assignment of errors which is filed herewith and for an order fixing the amount of bond of supersedeas in said cause and for such other orders and process as may cause the same to be corrected by the said Supreme Court of the United States, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Dated at New Haven, in the State of Connecticut, this 6th of June, 1905.

CHARLES K. OFFIELD,
By CHARLES K. BUSH,
EDWARD H. ROGERS,
His Attorneys.

SUPREME COURT OF ERRORS, State of Connecticut, } ss:

The writ of error as prayed for in the foregoing petition is hereby allowed this 6th day of June, 1905, the writ of error to operate as a supersedeas, and a bond for that purpose is fixed at the sum of $500.

Dated at New Haven, Connecticut, this 6th day of June, 1905.

DAVID TORRANCE,
Chief Justice of the Supreme Court of Errors
of the State of Connecticut.

63 New Haven County, October Term, 1904.

N. Y., N. H. & H. R. R. Co. }
v.
OFFIELD. }

Application under Gen. Stat., sec. 3694, to procure the condemnation of two shares of stock in the New Haven & Derby R. R. Co., brought before a judge of the superior court (Hon. Edwin B. Gager) and reserved by him on a demurrer to the application for the advice of this court. Advice given that the demurrer be overruled.

64 BALDWIN, J.:

For many years any railroad company of this State has had a statutory right to take a lease of the property or franchise of, or to lease its own property or franchises to any other such company, with whose tracks its own may connect, and no limitation has been prescribed as to the term of the lease, provided it should be approved by a two-thirds vote of the stockholders in each. Gen. Stat., secs. 3702, 3703. In 1889 and 1899 the plaintiff was empowered to increase its capital stock until the year 1910, for the purpose of exchanging shares in it (on terms to be approved by a committee consisting of two officers of the State and a lawyer to be appointed by the governor) for shares in the capital stock of any railroad company whose road it might be holding under a lease running for not less than fifty years, or of buying such shares. Until the entire capital stock of any such leased line should be so obtained, such shares as might be obtained were to remain in the plaintiff's control "as its property, the said stock to be used for all purposes of income, corporate organization, management and franchise; but for all other purposes, including purposes of taxation, it shall be deemed to be transferred to and merged into the stock of the New York, New Haven and Hartford Railroad Company, subject, nevertheless, to the right of any proper court to control the undue exercise of such power of voting on said stock for the protection

of other stockholders." Should it "retire all of the capital stock of any such leased line, by purchase or exchange, the executive officers of said respective companies shall certify the same by certificate to be filed in the office of the State secretary, and the said stock of said leased line and all its franchises shall thereupon be and be deemed to be forever transferred to and merged in the stock and fran-
65 chise of the said New York, New Haven and Hartford Railroad Company." X Special Acts, 1298; XIII Special Acts, 41.

Pursuant to the powers thus granted, the plaintiff has taken a lease of the New Haven & Derby railroad for 99 years from July 1, 1892, at a net rental of four per cent. a year on its capital stock, and has acquired 4468 shares of its capital stock, which is divided into 4470 shares of the par value of $100 each. The leased railroad has a mileage of less than seventeen miles, and a funded indebtedness of $1,280,000. It connects at New Haven, on the east, with four, and at its western terminals with two important railroad lines owned by the plaintiff, and forms a link in an all-rail route between Boston and the West which is the only one controlled by it over which goods can be transported with assured dispatch in all weathers and at all seasons. To develop this route so as best to serve the public interest requires the laying of additional tracks on the New Haven & Derby railroad and other extensive and very costly improvements. The lessor company has neither means nor credit whereby this can be effected on advantageous terms. The plaintiff could and will effect it, and at much less cost, if it can acquire the two outstanding shares of the stock of the lessee. They are owned by the defendant, who refuses to agree on terms of purchase.

It has become the settled policy of this State, evidenced by a long course of legislation, to allow the consolidation of connecting railroad properties under one management. It is for the public interest that railroads should be built in such a manner as to make them most useful to the public. When, to attain that end, large expenditures must be made, it is for the public interest that the requisite funds should be secured by those making the outlay and
66 operating the railroad on such terms and conditions as to impose upon them no unnecessary burden, for whatever that burden is, its weight, by increasing the fixed charges which they must meet, is apt ultimately to fall upon those travelling or forwarding goods over the railroad.

The plaintiff's railroad is a great highway for public use. Every improvement upon it furthers the public use, and the more economically it is made, providing it be well made, the more is such use promoted, because it will cost the public less. The charges for railroad transportation must always be reasonable, but in determin-g what is reasonable, the actual expense of construction is a legitimate subject of consideration. The record shows the credit of the New Haven & Derby Railroad Company to be such that if it could provide the means for the projected improvement of its property at all,

it must be by contracting loans at a higher rate of interest than would be paid by the plaintiff for similar assistance.

This being so, the public interest would be better served by having the plaintiff do the work. That it is a necessary work in order to make the railroad of the greatest service to the public is admitted by the demurrer. It will therefore promote the use for which the line was originally constructed. Whatever in the nature of a property interest stands in the way of such promotion the State can put aside. Any kind of property can be taken for public use on making just compensation. The whole franchise of a corporation may be so taken. Enfield Toll Bridge Co. v. Hartford & New Haven R. R. Co., 17 Conn., 40, 454; Greenwood v. Freight Company, 105 U. S. 13, 22. Its whole property may be likewise taken. Bigelow v. Union Freight R. R. Co., 137 Mass., 478. Shares of stock
67 represent an undivided interest in such franchises and property, and for the same reason can be taken, if to take them seems to the State necessary in furtherance of public uses. Black v. Delaware & Raritan Canal Co. 22 N. J. Eq., 130; 24 N. J. Eq., 455, 468, 484. That the uses to be furthered are public is a question the decision of which by the legislative department, while not absolutely conclusive are the judicial department, on a proceeding like the present, is entitled to very great weight. N. Y., N. H. & H. R. R. Co. v. Long, 69 Conn., 424, 436.

That to take property for the construction of a railroad by a private corporation is to take it for a public use is firmly settled. It is so taken because the public benefit will be promoted by such a railroad. Bradley v. N. Y. N. H. & H. R. R. Co., 21 Conn, 294, 305. In like manner may it be promoted by improving such a railroad and making it more useful. By taking the defendant's shares of stock the New Haven & Derby Railroad Company, which now survives as a mere shell, will become extinguished, and its franchise will become merged in that of the plaintiff. The General Assembly did not transgress their power in authorizing condemnation proceedings when necessary to brush such a ghost of a corporation out of existence. Its survival can serve no useful purpose; its extinction may facilitate and lessen the cost of the construction and improvements necessary to make the railroad of which it is now the owner fulfil its office to the best effect. Starr Burying Ground Asso. v. North Lane Cemetery Asso., 77 Conn., 88. Under the circumstances of this case, the condemnation of the defendant's two shares of stock is in substance and effect a condemnation of the franchise and property of the company for a public use which it has ceased to serve efficiently.

68 It is contended that if the plaintiff is allowed to take the defendant's shares, it becomes their absolute owner and may sell them as such to private purchasers. Whether such a claim would be entitled to any regard, were the defendant's shares not the only ones now outstanding, we need not inquire. Their acquisition, under the terms of the plaintiff's charter, will *ipso facto* work a

merger, and preclude any possibility of their being applied to a private use.

It is further argued that the statutory permission to maintain an application of this nature is a grant to a set of men of exclusive privileges from the community, and so in violation of our Constitution. (Art. 1, sec. 1.) The statute is for the benefit of all railroads to which its term may apply. Railroad companies constitute a peculiar class of artificial persons which can properly be invested with special privileges of a kind calculated to promote the public good. Drouin v. Boston & Maine R. R., 74 Vt., 343; 52 Atlantic, 957.

Nor will the defendant be deprived of property without due process of law. This proceeding is due process. Murray's Lessee v. Hoboken Land and Improvement Co., 18 How., 272.

The claim that the statute impairs the obligation of a contract is equally groundless. When the defendant acquired his shares, he became a member of a corporation charged with a public trust. It has acquired a railroad for public use. It has given a lease of it to the plaintiff, subject to the same trust, for public use. It is the right of the State to do whatever is necessary to secure its being put to the best use in fulfilment of the trust. Gates v. Boston & New York Air Line R. R. Co. 333, 342.

Our advice is that the demurrer be overruled.

No costs will be taxed in this court in favor of either party.

In this opinion the other judges concurred.

69 The foregoining is a true copy of the original opinion as filed with the *the* reporter of the court; but the opinion is subject to alteration and addition by the judges until printed in the official reports.

JAMES P. ANDREWS, Reporter.

(Indorsements:) N. Y. N. H. & H. R. R. Co. v. Offield. New Haven county, Oct. term, 1904. Opinion. Baldwin, J. Superior court, New Haven county, Filed Dec. 24, 1904. Fowler, ass't clerk.

70 New Haven County, April Term, 1905.

N. Y., N. H. & H. R. R. Co.
v.
OFFIELD.

Application to Hon. Edwin B. Gager, a Judge of the Superior Court for the Appointment of Appraisers of Two Shares of the Stock of the New Haven & Derby R. R. Co., Owned by Defendant.

A demurrer to the application having been overruled, pursuant to the advice of this court (77 Conn., 417), an answer was filed, containing two defences. A demurrer to the second defence was sustained,

and upon a hearing on the first a judgment was rendered as claimed, for which this appeal was taken. *No error.*

71 BALDWIN, J.:

The second defence in the defendant's answer was that the plaintiff already had, under certain amendments to its charter which were set forth at length, power to do all that it proposed, by means as advantageous to the public as it would have, should it take the defendant's shares of stock. As courts take judicial notice of all the private acts of this State, and as the judge of the superior court, in dealing with this cause, was exercising part of the judicial powers of that court, this defence presented a mere question of law, already disposed of in accordance with our advice; and the demurrer to it was properly sustained. Gen. Stat., sec. 697; New Milford Water Co. v. Watson, 75 Conn., 237.

Upon the hearing on the questions of fact raised by the first defence, it appeared that the directors of the plaintiff company had voted to authorize the expenditure of $275,000, under the supervision of its president, for improving and double tracking about four miles of the New Haven & Derby railroad, next west of the intersection of that railroad with the Naugatuck division of the plaintiff's railroad; that from this intersection to New Haven by way of the Naugatuck division was over twenty-one miles, and by way of the New Haven & Derby railroad less than eleven miles; and that the work under the vote was already under contract and in progress. The president of the company testified that it was its intention to make all the improvements described in the application as proposed, in case of the acquisition of the defendant's stock; and that it had begun the work on the tracks lying west of the Naugatuck division because the necessity for such improvements there was so great that the company could not wait till these two shares had been acquired. There was no error in the admission of this evidence. It was necessary to
72 show a recorded vote of the directors authorizing the execution of the entire improvements contemplated, in case of the acquisition of the stock in controversy. The president of a railroad corporation may well be sufficiently acquainted with the policy and plans of its directors to testify in regard to them, although they may have never been made the subject of formal action. The rule as to parol evidence of a corporate intent inconsistent with action which has been taken and is on record has no application to parol evidence as to a corporate intent respecting action to be taken in the future.

In the case at bar it did not appear that the directors of the plaintiff had passed any vote relating to the subject in hand, except that above mentioned, and no evidence was offered in opposition to the testimony of the president.

The proofs submitted have satisfied the judge of the superior court that the statements in the application were true, he properly found

that the acquisition of the defendant's stock will be for the public interest, and proceeded, notwithstanding the objections of the defendant, to appoint appraisers. N. Y., N. H. & H. R. R. Co. v. Offield, 77 Conn., 417.

It is contended that the plaintiff was bound to show that the board of directors had voted both to make all the improvements described in the application, and to take for that purpose the defendant's stock. The absence of allegations to that effect in the application was not made a ground of demurrer, nor was this point made at any stage of the cause before the judge of the superior court. It is therefore unnecessary to consider it here.

There is no error.

(Indorsement:) N. Y., N. H. & H. R. R. Co. v. Offield. New Haven county, Apr. term, 1905. Opinion, Baldwin, J.

73 The foregoing is a true copy of the original opinion as filed with the reporter of the court; but the opinion is subject to alteration and addition by the judges until printed in the official reports.

JAMES P. ANDREWS, Reporter.

(Indorsement:) Superior court, New Haven county, Filed May 16, 1905. Fowler, asst. clerk.

(Endorsements:) In the Supreme Court of the United States and in the supreme court of errors of the State of Connecticut. The New York New Haven and Hartford Railroad Company, defendant in error vs. Charles K. Offield, plaintiff in error Petition for writ of error Filed June 6, 1905 Edward A. Anketell clerk of the supreme court of errors.

74 In the Supreme Court of the United States, and in the Supreme Court of Errors of the State of Connecticut.

CHARLES K. OFFIELD, Plaintiff in Error,
vs.
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Defendant in Error.

Assignment of Errors.

Afterwards, to wit, on the 6th day of June, 1905, comes Charles K. Offield, plaintiff in error, by Charles K. Bush and Edward H. Rogers, his attorneys, and says that in the record and proceedings in the above entitled cause, there is manifest error in this, to wit:

1. Because the court overruled the claim of the said plaintiff in error, that the statutes of the State of Connecticut, sections 3694 and 3695, of the General Statutes of the State of Connecticut, revision of

1902, under which said application was brought and said proceedings had, authorizing the condemnation of the stock of the plaintiff in error, and the appointment of appraisers was not due process of law, and was a violation of the 14th amendment to the Constitution of the United States.

Said statutes referred to are as follows:

"SEC. 3694. In case any railroad company acting under the authority of the laws of this State shall have acquired more than three-fourths of the capital stock of any steamboat, ferry, bridge, wharf, or railroad corporation, and cannot agree with the holders of outstanding stock for the purchase of the same, such railroad company may, upon a finding by a judge of the superior court that such purchase will be for the public interest, cause such outstanding stock to be appraised in accordance with the provisions of sec. 3687. When the amount of such appraisal shall have been paid or deposited as provided in said section, the stockholder or stock-
75 holders whose stock shall have been so appraised shall cease to have any interest therein, and on demand shall surrender all certificates for such stock, with duly executed powers of attorney for transfer thereon, to the corporation applying for such appraisal."

"SEC. 3695. If any person holding a minority of the shares of stock in any corporation referred to in sec. 3694 cannot agree with the railroad company owning three-fourths of such stock for the purchase of his shares, he may cause the same to be appraised in accordance with the provisions of sec. 3687. When such appraisal has been made and recorded in the office of the clerk of the superior court of any county where such railroad company operates a railroad, and the certificates for such stock, with duly executed powers of attorney for *for* transfer thereon, have been deposited with such clerk for such railroad company, such appraisal shall have the effect of a judgment against such company and in favor of the holder of such stock, and at the end of sixty days, unless such judgment is paid, execution may be issued."

2. Because the court overruled the claim of the said plaintiff in error, that the said statutes of the State of Connecticut, sections 3694 and 3695 of the General Statutes, revision of 1902, authorizing the condemnation of the stock of the plaintiff and the assignment of appraisers, was in violation of article 1, section 10, of the Constitution of the United States, prohibiting a State from passing any law impairing the obligation of contracts.

3. Because the court overruled the claim of the plaintiff in error that the said statutes, sections 3694 and 3695 of the General Statutes of the State of Connecticut, revision of 1902, authorizing the condemnation of the stock of the plaintiff in error, was in violation of article 5, in addition to, and amendment of the Constitution of the United States, providing that no person shall be deprived of his property without due process of law; nor shall private property be taken for public use without just compensation.

4. Because the court held that the condemnation of the said property of the plaintiff in error, for the purposes set forth in said proceedings, was a public use and the legitimate exercise of the power of eminent domain.

5. Because the court overruled the claim of the plaintiff in error, that the condemnation of the stock of the plaintiff in error
76 was a taking for a private use.

6. Because the court erred in holding that the condemnation of said stock of the plaintiff in error, for the purposes set forth, was not subject to any limitation contained in the Constitution of the United States.

Wherefore, the said Charles K. Offield prays that the judgment aforesaid may be reversed and annulled and held for nothing, and that he the said Charles K. Offield, may be restored to all things which he has lost by occasion of the said judgment.

CHARLES K. BUSH,
EDWARD H. ROGERS,
Attorneys for Plaintiff in Error.

(Endorsements:) In the Supreme Court of the United States and in the supreme court of errors of the State of Connecticut. Charles K. Offield, plaintiff in error vs. The N. Y. N. H. & H. R. R. Co., defendant in error. Assignment of errors. Filed June 6 1905. Edward A. Anketell, clerk.

77 Know all men by these presents, that we, Charles K. Offield of Chicago, Cook county, State of Illinois, as principal, and Charles K. Bush of Orange, county of New Haven, State of Connecticut, are held and firmly bound unto the New York, New Haven and Hartford Railroad Company, a corporation chartered by the General Assembly of the State of Connecticut, and located and having its place of business in New Haven in the State of Connecticut, in the full and just sum of five hundred dollars to be paid to the said The New York, New Haven and Hartford Railroad Company, its certain attorney, executors, administrators, successors or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 5th day of June, in the year of our Lord one thousand nine hundred and five.

Whereas, lately at a term of the supreme court of errors of the State of Connecticut, in a suit depending in said court, between The New York, New Haven and Hartford Railroad Company, plaintiff and Charles K. Offield, defendant, a judgment was rendered against the said Charles K. Offield and the said Charles K. Offield having obtained from the *Superior* Court of the United States a writ of error to reverse the judgment of said supreme court of errors of the State of Connecticut in the aforesaid suit, and filed a copy thereof in the

clerk's office of the said supreme court of errors of the State of Connecticut, in the aforesaid suit, and a citation directed to the said The New York, New Haven and Hartford Railroad Company, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said Charles K. Offield shall prosecute to effect, and answer all damages and costs if he fail to make his plea good, then the
78 above obligation to be void; else to remain in full force and virtue.

CHARLES K. OFFIELD. [SEAL.]
CHARLES K. BUSH. [SEAL.]

Sealed and delivered in the presence of—
EDWARD H. ROGERS.

Approved as to form and amount and ordered to operate as a supersedeas.

DAVID TORRANCE,
Chief Justice of the Supreme Court of
Errors of the State of Connecticut.

(Endorsement:) Charles K. Offield plaintiff in error vs. The New York, New Haven and Hartford Railroad Company, defendant in error. Bond on prosecution of writ of error from Supreme Court of the United States. Filed June 6, 1905. Edward A. Anketell, clerk of supreme court of errors.

79 In the Supreme Court of the United States and Supreme Court of Errors of State of Connecticut.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Defendant in Error,
vs.
CHARLES K. OFFIELD, Plaintiff in Error.

The defendant, Charles K. Offield, plaintiff in error, having this day filed his petition for a writ of error from the Supreme Court of the United States, to review the decision and judgment thereon made and entered herein, to the supreme court of errors of the State of Connecticut together with an assignment of errors within due time, and also praying that an order be made fixing the amount of security which defendant should give and furnish upon said writ of error, and that upon the giving of said security, all further proceedings of this writ be suspended and stayed until the determination of said writ of error by said United States Supreme Court, and said petition having this day been duly allowed.

Now, therefore, it is ordered, that upon the said Charles K. Offield, filing with the clerk of this court a good and sufficient bond in the sum of $500, conditioned that if said defendant and plaintiff in error, Charles K. Offield, shall prosecute the said writ of error to effect, and answer all damages and costs if he fails to make his plea good, then the said obligation to be void; else to remain in full force and virtue, the said bond to be approved by the court, and that all further proceedings in this court be, and they are hereby, suspended and stayed, until the determination of said writ of error by the said Supreme Court of the United States.

Dated this 6 day of June, 1905.

DAVID TORRANCE,
Chief Justice of the Supreme Court of
Errors of the State of Connecticut.

80 (Indorsement:) Charles K. Offield, plaintiff in error, vs. The New York, New Haven and Hartford Railroad Company, defendant in error. Order concerning bond and supersedeas. Filed June 6, 1905. Edward A. Anketell, clerk of supreme court of errors.

81 In the Supreme Court of the United States and in the Supreme Court of Errors of the State of Connecticut.

STATE OF CONNECTICUT,
County of New Haven, Third Judicial District, } ss:

I, Edward A. Anketell, clerk of the supreme court of errors of the State of Connecticut for the third judicial district, hereby make return to the foregoing writ of error and herewith transmit a true copy and transcript of the record in said cause remaining in this court, duly authen-icated, together with a copy of the opinions of the said supreme court of errors and a copy of the judgments of said supreme court of errors, together with copies of the petition for writ of error, the assignment of errors with a prayer that the judgment aforesaid be reversed, the order concerning the bond of supersedeas, etc., the bond and the original citation to the adverse party showing service thereon to have been duly made as appears by the endorsement thereon.

In testimony whereof I hereunto set my hand and affix the seal of said supreme court of errors this 7th day of June, A. D., 1905.

[Seal Supreme Court of Errors, Con.]

EDWARD A. ANKETELL,
Clerk of the Supreme Court of Errors of the State of
Connecticut for the Third Judicial District.

82 [Endorsed:] In the Supreme Court of the United States. Charles K. Offield, plaintiff in error, vs. The New York, New Haven and Hartford Railroad Company, defendant in error. Writ of error from the Supreme Court of the United States to the supreme court of errors of the State of Connecticut.

Endorsed on cover: File No. 19,816. Connecticut supreme court of errors. Term No. 314. Charles K. Offield, plaintiff in error, vs. The New York, New Haven & Hartford Railroad Company. Filed June 24th, 1905. File No. 19,816.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 59

CHARLES K. OFFIELD, *Plaintiff in Error.*

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, *Defendant in Error.*

WRIT OF ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

Brief for Plaintiff In Error Upon Motion of Defendant In Error to Dismiss for Want of Jurisdiction, and to Affirm the Judgment of the Connecticut Supreme Court of Errors.

EDWARD H. ROGERS,
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Attorneys for Plaintiff in Error.

W. H. H. MILLER,
Of Counsel.

THE HOLLENBECK PRESS, INDIANAPOLIS

IN THE

Supreme Court of the United States.

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CHARLES K. OFFIELD, *Plaintiff in Error.*

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, *Defendant in Error.*

WRIT OF ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

Brief for Plaintiff In Error Upon Motion of Defendant In Error to Dismiss for Want of Jurisdiction, and to Affirm the Judgment of the Connecticut Supreme Court of Errors.

STATEMENT.

This is a writ of error to the Supreme Court of Errors of the state of Connecticut to review a final judgment of that court. The Supreme Court of Errors is the highest

court of the state of Connecticut in which a decision could be had. The proceeding was an application by the defendant in error, brought to a judge of the Superior Court of the State of Connecticut, to condemn the shares of stock owned by the defendant in the New Haven and Derby Railroad Company, under sections 3694 and 3695 of the General Statutes of Connecticut, revision of 1902. These sections, originally adopted by the General Assembly of the state of Connecticut in 1896 (Public Laws of Connecticut, 1896, chapter 232), are now as follows:

SECTION 3694.—"In case any railroad company, acting under the authority of the laws of this state, shall have acquired more than three-fourths of the capital stock of any steamboat, ferry, bridge, wharf, or railroad corporation, and can not agree with the holders of outstanding stock for the purchase of the same, such railroad company may, upon a finding by a judge of the Superior Court that such purchase will be for the public interest, cause such outstanding stock to be appraised in accordance with the provisions of section 3687. When the amount of such appraisal shall have been paid or deposited as provided in said section, the stockholder or stockholders whose stock shall have been so appraised shall cease to have any interest therein, and on demand shall surrender all certificates for such stock, with duly executed powers of attorney for transfer thereon, to the corporation applying for such appraisal.

SECTION 3695.—"If any person holding a minority of the shares of stock in any corporation referred to in section 3694 can not agree with the railroad company owning three-fourths of such stock for the purchase of his shares, he may cause the same to be appraised in accordance with the provisions of section 3687. When such appraisal has been made and recorded in the office of the clerk of the superior court of any county where such railroad company operates a railroad, and the certificates for such stock, with duly executed powers of attorney

for transfer thereon, have been deposited with such clerk for such railroad company, such appraisal shall have the effect of a judgment against such company and in favor of the holder of such stock, and at the end of sixty days, unless such judgment is paid, execution may be issued."

The New Haven and Derby Railroad Company was incorporated in 1864 (Private Laws of Connecticut, vol. 5, 653), with power to locate, construct and finally complete a single, double or treble railroad or way from New Haven, in Connecticut, through the town of Orange, in Connecticut, to the town of Derby, in Connecticut. A copy of said charter is printed in "Appendix A," hereto attached. Its capital stock consisted of 4,470 shares of the par value of $100 each. It was leased to the defendant in error for a period of ninety-nine years from July 1, 1899, at a rental of 4 per cent. per annum upon the capital stock during the remainder of said term, together with the payment of taxes, assessments and interest upon the funded debt.

Record, p. 11.

The defendant in error based its application and its alleged right to the extraordinary relief asked for upon the ground that the railroad of the New Haven and Derby Railroad Company, by means of its connection at New Haven with the other lines of the defendant in error, forms a part of the most important freight track line entering New England and controlled by the defendant in error, and a through all-rail route between Boston, Providence, New Haven and the west; that the plaintiff in error, by his refusal to sell his shares of stock of the New Haven and Derby Railroad Company, has defeated the carrying out of the project of the defendant in error for improving the through service of its road by constructing additional tracks and making many improve-

ments upon the New Haven and Derby Railroad Company, and that if the additional tracks and improvements can be built upon the credit of the New Haven and Derby Railroad Company at all, it can only be by financing said new construction upon less advantageous terms than could be done by the defendant in error after merger, necessitating higher rates and charges for the service on said railroad, whereas the public interest requires that such charges be reduced to the lowest practicable amounts, as could and would be done in case of merger by the acquisition of all the stock of said New Haven and Derby Railroad Company by the applicant.

Record, pp. 11 and 12.

There was a demurrer to this application by the plaintiff in error (Record, pp. 13 and 14), and under the practice obtaining in Connecticut the demurrer and the questions of law arising, and as to what judgment should be rendered, were reserved for the advice and consideration of the Connecticut Supreme Court of Errors. After argument, the Connecticut Supreme Court of Errors advised a judgment that the demurrer be overruled.

Record, pp. 15 and 16.

The opinion of the Supreme Court of Errors is reported in 77 Connecticut Reports 417, and is printed in the Record on pp. 16-19. This advice of the Supreme Court of Errors being mandatory and imperative (Clarke's Appeal, 70 Conn. 483), the demurrer was overruled pursuant to the advice of the Supreme Court of Errors (Record, p. 20), and the parties were at issue upon an answer filed by the plaintiff in error (Record, pp. 21-24). The judge of the superior court, before whom the application was pending, having sustained a demurrer to the answer (Record, p. 25), heard the parties upon a

reply to the answer and made a judgment, which judgment also contained a finding of facts (Record, pp. 25-27). The plaintiff in error thereupon appealed from this judgment to the Supreme Court of Errors (Record, pp. 27-29), and this judgment, after argument of the appeal, was sustained. The opinion sustaining the judgment is printed in the Record at length (Record, pp. 30-31), and is also reported in 78 Connecticut Reports 1.

The defendant in error contended in the Connecticut courts:

1. That the alleged purpose for which it is sought to obtain the defendant's stock is not a public use.

2. That the plaintiff has now power and authority to make all of the improvements mentioned in the application, and to promote the public usefulness in a manner and by means as advantageous to the public as it would have after the taking of said stock, and that there is therefore no allegation in the complaint of any legal or sufficient justification of the right of the defendant in error to take the stock of the plaintiff in error.

3. That the proceeding and the statute upon which it is based is in violation of the constitution of the United States: first, that it is not due process of law under the fifth and fourteenth amendments; and second, that it is an impairment of the contract rights of the plaintiff in error as a stockholder of the New Haven and Derby Railroad Company, and of his rights in, under and by virtue of the lease to the defendant in error of the stock of the New Haven and Derby Railroad Company.

This motion of the defendant in error raises the question that no federal question is presented.

I.

The question for immediate consideration arises on the motion to dismiss or affirm. The brief which follows seems to us to show clearly that this is not a case to be thus summarily disposed of.

The question as to what constitutes a public use was perhaps more thoroughly considered by this court in the old case of *Loan Association* v. *Topeka*, 20 Wallace 655, than elsewhere. At least this is the leading case on the subject in this court. There it is made clear that as a proposition of general law, quite independently of any state statutes, there can be no appropriation under the power of eminent domain except for a public purpose, and that public purpose must be direct, not indirect or collateral.

It is most respectfully submitted that a railroad company which has obtained a lease of another railroad company for ninety-nine years, almost all of that ninety-nine years being in the future, has no right or power to condemn as against the holder of shares of the capital stock of the lessor railroad company, thus practically abrogating its own contract. So far as we are aware, all statutes authorizing the exercise of the power of eminent domain, except the statute in question, require that power to be exercised by the railroad company for whose immediate use the property acquired is attempted to be appropriated. This, it will be noticed, is not a proceeding in the name of the New Haven and Derby Railroad Company to condemn this stock belonging to plaintiff in error, but it is a proceeding by the lessee of that railroad company to condemn the stock of the railroad company—not the railroad itself. The title to the railroad is in New Haven and Derby Railroad

Company, not in its stockholders. *Pullmans, etc.*, v. *Missouri, etc.*, 115 U. S. 587. It is submitted that it is a question well worthy of careful and deliberate consideration by this court whether it is competent for the legislature of a state to provide for the condemnation of private property of an individual or appertaining to one railroad company by and for the railroad purposes of another railroad company.

This question arose in Indiana thirty years ago in the case of *Swinney* v. *The Fort Wayne, Muncie and Cincinnati Railroad Company*, 59 Ind. 205. In that case one of the exceptions to the report of the appraisers was that the property sought to be appropriated was appropriated, not for the railroad making the appropriation, but for the use of another railroad, and it was held that it was not competent for such appropriation to be made by one party for the use of another.

Moreover the proposed appropriation in the case at bar is not an appropriation for public use, but it is an appropriation of the shares of stock of a private citizen simply for the advantage of the stockholders of the lessee company. There is no pretense that the lessee company has not the actual possession, the actual use, every beneficial use of the property itself. It has a lease of the property for ninety-nine years. It has agreed to pay a rental of 4 per cent. to the plaintiff in error in the way of dividends upon his stock for that period. Any claim that there is a public necessity for the appropriation of this stock, any reason why the dividends on this stock should not be paid to Mr. Offield instead of to the lessee company or its stockholders, is a mere pretense, having no basis in public interest. If the attempt were to condemn the property itself, the corpus, a very different proposition would be presented, though it may be very doubtful whether a railroad company which has just taken a lease of the

property of another railroad company for a hundred years can immediately turn around and by appropriating that property abrogate its lease.

Undoubtedly, if a railroad company authorized by statute proceeds to condemn physical private property for the use of the railroad, it may make a person holding a mortgage upon the physical property sought to be condemned a party, and condemn his interest in order to obtain a complete title. But that is not what is sought to be done here. Here the defendant in error has entered into an agreement whereby for ninety-nine years it has practically agreed to pay to the plaintiff in error an annuity of 4 per cent. on his property; and to say that having thus done so, it has a right to go into court and condemn that annuity and appropriate it to its own use under the power of eminent domain, seems to us a total misapprehension of the meaning and a misapplication of the principles of eminent domain.

If the defendant in error had wanted to condemn this property, it should have done so before it made the contract with plaintiff in error, or with the company of which he was a stockholder, for his benefit. As it did make such contract, when by its lease it agreed to pay each shareholder a dividend upon each share of stock held by him of 4 per cent. during the pendency of the lease, to hold that it may do what it is trying to do is to hold that a railroad company, having made a contract with a farmer for a right of way across his road for a period of years at so much per year, may immediately turn around and abrogate that contract by a compulsory appropriation of the property. Nay more, it is practically to hold that, if a railroad company has entered into a contract with a farmer to purchase the right of way across his farm, and has agreed to pay him a given sum of money therefor, and has been put into possession and has built and is

operating its road over its property, it may repudiate such purchase, go into court and have the question of the price to be paid for that property adjudged by arbitrators appointed by the court, and all this under a statute enacted after such contracts were made.

As already said, what the railroad company might have done if it had not made this lease and this agreement to pay this rental of 4 per cent. is one thing, and what it may now do in view of the fact that it has made that lease and agreement is a totally different proposition.

Nor do we think the cases cited in the brief in support of the motion to dismiss in point.

In the Long Island Water case, 166 U. S. 685, there was a condemnation of the tangible property of the water supply company and of the contract simply as an incident thereto, and stress is placed on that fact in the opinion. Suppose that a lease by the water company to another water company had been made, the lessee assuming the obligations of the lessor to third parties: could the lessee turn right around and condemn those obligations independently of the property and have the value thereof fixed by appraisers?

The Cherokee Nation case, 135 U. S. 641, states nothing apposite to this case. It simply announces the familiar doctrine that property may be condemned for railroad purposes.

Nor is *Clark* v. *Nash*, 198 U. S. 361, significant here. It only announces that what is a public use in one place may or may not be in another.

But wherein is there a public interest or public use that these shares of stock shall be owned by this lessee railroad company instead of by the present holder, Mr. Offield? Is there something peculiar in the soil or atmosphere of Connecticut that requires it?

With the utmost respect it is submitted that the public

need existing here is of the same kind as the need of King Ahab for Naboth's vineyard, so graphically described in the twenty-first chapter of I Kings, and the justice of the demand in each case is about the same. The king was willing to pay full price, and more, but Naboth did not wish to sell, and the king had no right to take the vineyard. This railroad company is, we assume, willing to pay full price, but Mr. Offield does not wish to sell this stock—an heir-loom in his family—and the railroad company has no right to take it, because it has no need for it for railroad purposes, and it is not taking it for a public use. If the legislature of Connecticut could authorize this taking by the holder of the majority of the stock it could authorize the majority holders of stock to condemn the minority of stock in any railroad company upon the ground that a party holding all the stock could operate it better than if the holdings were divided.

But, without further elaborating this subject-matter, it seems too clear for argument, as stated at the beginning, that this is a question, not for summary decision, but a question involving the application of principles of the utmost gravity and importance, the application of principles which should not be summarily disposed of on a motion to dismiss or affirm without oral argument. The principles suggested and the authorities considered in the case first cited, *Loan Association* v. *Topeka*, in their relation to this case, are too grave to be disposed of in such a summary way. The writer of the foregoing has not had time to consider the question upon its merits, though the following discussion by other counsel seems to make it clear that a federal question is presented, that the questions involved are of the utmost gravity, and not only require deliberate argument and consideration, but require a reversal of the judgment.

II.

THE STATUTE UPON WHICH THIS PROCEEDING IS BASED, AND THE PROCEEDINGS TAKEN UNDER IT BY THE DEFENDANT IN ERROR, ARE AN ATTEMPTED EXERCISE OF THE POWER OF EMINENT DOMAIN.

The statute is based upon the principle of eminent domain, and the real, and indeed the only, reason which the Supreme Court of Errors of Connecticut had to justify its decision was that every railroad is a public trust, and that the state can exercise the power of eminent domain so far as may be necessary to secure the property taken being put to the best use in fulfilment of the trust for a public use.

III.

THE RIGHT OF EMINENT DOMAIN CAN ONLY BE LEGALLY EXERCISED WHEN THE PROPERTY TAKEN IS TAKEN FOR A PUBLIC USE.

The right of eminent domain is not a creature of grant. It is one of the inherent powers of sovereignty. In some states, as in Connecticut, it is recognized by the constitution. Section 11 of article I of the constitution of Connecticut provides that:

"The property of no person shall be taken for public use without a just compensation therefor,"

a provision which by implication denies the right to take private property for other than public use, and which means that private property shall be taken for no other than the public use, and then only upon the payment of just compensation.

Farist Steel Co. v. *Bridgeport Co.*, 60 Conn. 278-291.

IV.

THE CONDEMNATION OF THE STOCK OF THE PLAINTIFF IN ERROR BY THE DEFENDANT IN ERROR IS NOT A TAKING FOR A PUBLIC USE.

1. The question of what is a public use is always one of law.

Cooley's Constitutional Limitations, 774;
In re Niagara Falls v. *Whirlpool R. W. Co.*, 108 N. Y. 375;
In re Split Rock Cable Road Co., 128 N. Y. 408.

Mr. Lewis, in his valuable treatise on the law of eminent domain, points out that it is a serious error to treat the question of *What is a public use?* as though the question was *For what purpose may the power of eminent domain be properly exercised?*

Lewis on Eminent Domain, vol. 1, section 163.

The courts everywhere agree that this power of eminent domain is the power of a sovereign state to appropriate private property to particular uses for the purpose of promoting the general welfare.

"This power was originally in the people, in their sovereign capacity, and was by them delegated to the legislature in the general grant of legislative power. In the absence of any restrictions, the legislature could take private property for any purpose calculated to promote the general good. By the provision in question, the people said to the legislature, in effect, 'You shall not exercise this power except for public use.' To give these words any effect they must be construed as limiting the power to which they relate—that is, *as limiting the purposes* for which private property may be appropriated. As the power is by its nature limited to such purposes as

promote the general welfare, it is evident that the words public use, if they are to be construed as a limitation, can not be equivalent to the general welfare or public good. *They must receive more restricted definition.*"

Lewis on Eminent Domain, Vol. I, section 163.

The use of a thing is strictly and properly the employment of the thing in some manner, and this employment must be something more than a merely incidental public benefit.

"The fact that the use to which real estate is intended to be put, or the structures intended to be built thereon, will tend incidentally to benefit the public by affording additional accommodations for business, commerce or manufacturing, does not confer the right of eminent domain so long as the structures are to remain under private ownership or control, and no right to their use or to direct their management is conferred upon the public."

In re Eureka Basin Warehouse and Manufacturing Co., 96 N. Y. 42;
In re Niagara Falls and Whirlpool R. W. Co., 108 N. Y. 375;
In re Split Rock Cable Road Co., 128 N. Y. 408.

The attempted exercise of the power of eminent domain in this case can only be justified, if at all, on the ground that the right is broad enough to include those cases where the general public has only an indirect and qualified or constructive use of the property condemned, or perhaps properly no use of any kind of the property condemned, but simply derives from its use, by and for a private person or corporation, some indirect advantages, as by the promotion of the general prosperity of the community.

Now, in order to bring this within that class of cases, the defendant in error must show that it is possessed of *each and all* of these three qualifications:

"*First.* The general public must have a definite and fixed use of the property to be condemned, a use independent of the will of the private person or private corporation in whom the title of the property when condemned will be vested; a public use which can not be defeated by such private owner, but which public use continues to be guarded and controlled by the general public through laws passed by the legislature;

"*Second.* This public use must be clearly a needful one for the public, one which can not be given up without obvious general loss and inconvenience;

"*Third. It must be impossible, or very difficult, at least, to secure the same public use and purposes in any other way than by authorizing the condemnation of private property.* If any of these essentials is wanting the courts will declare the act of the legislature authorizing such condemnation of private property to be unconstitutional, because it would amount to taking private property for private and not for public uses."

Varner v. *Martin*, 21 West Va. 534, 552-556.

All these elements are certainly wanting in the case at bar, and the possibility of their existence in such a case as this can only be insured by a realization of the most radical schemes of governmental ownership and control.

The only public use which the defendant in error alleges in behalf of its right to take the stock of the plaintiff in error is the financing of its capital stock, so as to more cheaply improve and double-track the New Haven and Derby Railroad, which it is alleged can not now be safely done, as its interest as lessee may be impaired either by forfeiture or expiration of its lease, a contingency which the amended charter of the plaintiff (Record, pp. 21-24) has guarded against.

2. Moreover this amended charter of the defendant in error (Record, pp. 21-24) has contemplated these improvements, and has provided how they should be paid

for—a prohibition of their being financed in any other way.

3. And it is clear, we submit, that unless it be proposed to subject the property taken to a use public in its nature not already within the charter powers of the New Haven and Derby Railroad Company, the power of eminent domain should not be exercised.

There can be no necessity for or propriety in the taking unless the rights of the public with reference to the property taken are to be enlarged, and that directly and actually, and not indirectly and constructively.

The Connecticut Supreme Court of Errors has defined public use to be:

"Something in which all persons have the same measure or right for the same measure of money."

Evergreen Cemetery Association v. *Beecher*, 53 Conn. 551.

A use can not be a public use within the right of eminent domain unless equal rights are given to all.

Avery v. *Vermont Electric Co.*, 75 Vt. 235.

"There is considerable diversity of decision as to what constitutes a public use, and it is impossible to lay down a rule of universal application. We think, however, that the line of distinction, to which we have referred, is one which may be traced in all well considered cases, and that the true *test of such use is whether the taking is essential to the service of the public franchise, or whether it pertains only to the private interest of the company in the detail of its business.*"

In re Rhode Island Suburban R. W. Co., 28 R. I. 457-461.

"The proceeding should show upon its face that the

property, after it is taken, is to be devoted to the use of the public, independent of the *will of the corporation.*"

Berrien Springs Water Co. v. *Berrien,* 133 Mich. 48.

4. The case must not be confounded as such a case as *Black* v. *Delaware & Raritan R. R. Co.,* 24 N. J. Eq. 455, which involved the right of the legislature to grant authority to consolidate existing railroad routes, or a case in which majority holders desire to effect either an enlargement of the corporate powers, or a transfer of the property and franchises, or a merger of one corporation with another, *and in which provision is made for the exchange of stock.*

In either of such cases the real taking of the property occurs at the time when the corporation acts, whether by acceptance of a new charter, by transfer, or by agreement of merger, and is dependent upon the voluntary action of the majority, *and the principle of eminent domain is therefore not involved.*

The right of eminent domain is properly exercised when property is required for public use and can not be obtained by agreement with the owner. The owner has no choice as to whether he shall part with his property, and any supposed exercise of the right of eminent domain which is grounded upon consent instead of necessity is wrongful.

If corporate franchises and property are required for a new public use, the necessity is the same whether one or all of the stockholders object, *and the very fact that the right of consolidating two corporations is dependent upon the consent of a majority of the stockholders of each is itself conclusive against the necessity of the exercise of the power of eminent domain.*

Now, there is no right in the majority holders of a

corporation to extinguish the rights and stock of a dissenting minority by taking their shares at a valuation.

Clearwater v. *Meredith*, 1 Wall. 25;
Stevens v. *Rutland & B. R. R. Co.*, 29 Vt. 545.

So that if a majority of the stockholders of the New Haven and Derby Railroad Company had undertaken to transfer the defendant's stock against his wishes, they could have been enjoined by him.

"There was no power to force him to join the new corporation, and to receive stock in it on the surrender of his stock in the old company."

Clearwater v. *Meredith*, 1 Wall. 25, 41.

In the case at bar the real or actual taking was dependent upon a finding by a judge of the Superior Court of the State of Connecticut that the purchase would be for the public interest, which finding is an exercise of the judicial power which is vested in the Superior Court of the State of Connecticut, or a judge thereof, by the constitution of that state.

New Milford Water Co. v. *Watson*, 75 Conn. 237;
Norwalk Street R. W. Co.'s Appeal, 69 Conn. 576, 601-608;
Betts v. *Connecticut Indemnity Association*, 71 Conn. 751-755.

5. Neither can the decision of the Connecticut court be justified on the ground that the proceeding is a dissolution proceeding.

The argument is made by the Connecticut Supreme Court of Errors in its opinion that the acquisition in these proceedings of the stock of the plaintiff in error will, under the amended charter of the defendant in error, and

which is printed in the Record, pp. 21-24, *ipso facto* work a merger, and that its effect is a condemnation of the franchise and property of the company which it has ceased to serve efficiently.

The Connecticut statute, under which these proceedings are had, is broad enough in its terms to permit the taking of the defendant's stock for private use, and the application following the language of the statute is equally broad, so that if this corporation is permitted to acquire the stock of the plaintiff in error, it may or may not make the improvements which it alleges it contemplates, and the public will be powerless to control its action.

The law is well settled that a taking for a private use is unlawful, and that if there can be any lawful taking under the statute, it is inseparably blended in the application with the unlawful one, and that where the proceeding shows upon its face two distinct uses or purposes, one lawful and the other not, and which are so inseparably blended as not to be separable, it can not be sustained.

> Encyclopedia of Pleading and Practice, Vol. 7, 527;
>
> *Chicago & N. W. R. R. Co.* v. *Galt*, 133 Ill. 657.

If the statute, while permitting the private use of the property condemned, may also permit of a public use of it, the statute and the application are still invalid.

> "If the private use is combined with the public use in such a way that the two can not be separated, the whole act is void. So an application under an act to condemn property for purposes, part of which are within and part not within the act, will be bad in toto."
>
> Lewis on Eminent Domain, Vol. 1, section 20.

The argument is made by the Connecticut Supreme

Court of Errors, in its opinion, that the acquisition in this proceeding of the stock of the plaintiff in error will, under the amended charter of the defendant in error, *ipso facto* work a merger, and that its effect is a condemnation of the franchises and property of the company, which it has ceased to serve efficiently, and that the fact that the shares of stock of the plaintiff in error are the only outstanding shares not belonging to the defendant in error makes their acquisition *ipso facto* a merger.

But that argument is, we submit, subject to the fatal criticism that a corporation can not be dissolved except by unanimous consent, where the dissolution is merely a device to effect a consolidation which would otherwise be *ultra vires*.

Especially is this so where there are, as in Connecticut, statutes providing for the dissolution of all corporations, including such a corporation as the New Haven and Derby Railroad Company * * * the Connecticut Dissolution Statute (General Statutes, revision of 1902), sections 3391, 3392, 3393 (See Appendix B, hereto attached) for the dissolution of corporations and the distribution of their assets, and the sale of their property and franchises. See Appendix C, showing above three sections as amended in 1903.

The amendment to the charter previously referred to (Record, pp. 21-24), upon which the Connecticut Supreme Court of Errors relies, is not a dissolution statute, certainly not so long as any stock is outstanding, and the case at bar can not be decided upon any fast and loose principle dependent upon the size of the holding of the plaintiff in error, or with reference to the fact that the plaintiff in error is the only owner of stock not absorbed and outstanding, as the subtle and adroit opinion of the Connecticut court insinuates.

V.

The Statute upon which this Proceeding is Based, as Applied in this Case, Impairs a Contract.

The contention of the statute impairs the obligation of a contract, and can not be brushed aside by the argument of the Connecticut Supreme Court of Errors that when the plaintiff in error acquired his shares he became a member of a corporation charged with a public trust.

The defendant in error asks to have set aside a contract entered into between the holder of the stock and the corporation itself. And the only reason given to justify this extraordinary proceeding is that public necessity requires it. But this is not the condemnation of the stock itself or of the franchises. It is simply the holder of a majority of the stock saying to the minority holder, "I can operate this property which you own, and which you were chartered to construct and maintain, more cheaply if you and your stock were out of the way, and, therefore, I propose to exercise that power, and in effect make myself a new corporation for that purpose."

That, we submit, is not eminent domain, but is the impairment of a contract, and if this contention of the defendant in error and of the Connecticut Supreme Court of Errors is sound law, the rights of minority stockholders in this country are at an end.

VI.

The Statute under Which These Proceedings Were Had Being an Invalid Enactment under the Constitution of the United States, this Court Has Jurisdiction of this Writ of Error.

1. It is a taking for a private purpose.

As was stated by this court in *Madisonville Traction Company* v. *St. Bernard Mining Company*, 196 U. S. 239, it is a fundamental principle of American jurisprudence that private property can not be taken by the government, national or state, except for purposes which are of a public character, although such taking be accompanied by compensation to the owner—a principle which grows out of the essential nature of all free government.

"If the purpose be public the taking may be outright, provided reasonable, certain adequate provision is made at the time of the appropriation to ascertain and secure the compensation to be made to the owner. *Cherokee Nation* v. *Southern Kansas Railway Company*, 135 U. S. 641-649; *Sweet* v. *Rachel*, 159 U. S. 380-399; *Western Union Telegraph Co.* v. *Pennsylvania R. R. Co.*, 195 U. S. 540. Any state enactment in violation of these principles is inconsistent with the due process of law prescribed by the fourteenth amendment.

Madisonville Traction Co. v. *St. Bernard Mining Co.*, 196 U. S. 239-252.

A judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the fourteenth amendment of the constitution of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument.

Chicago, Burlington & Quincy R. R. Co. v. *Chicago*, 166 U. S. 226-241.

And the proposition that the state itself is the exclusive and final judge of what is a public use so as to prevent any federal question or federal interference is subject to

this limitation, that if the use for which the property taken is a private one, the taking is not valid, just as much as though there were a taking for a public purpose without compensation.

Missouri R. R. Co. v. *Nebraska*, 164 U. S. 403-417.

In other words, a state has no constitutional right to say that a private use is a public use, or to prevent the doctrine of eminent domain by declaring that any private purpose is a public purpose.

The true position on this subject is stated by the highest court of Kentucky in *Tracy* v. *Elizabethtown R. R. Co.*, 80 Ky. 259-265, and adopted by this court in *Madisonville Traction Company* v. *St. Bernard Mining Company*, 196 U. S., *supra*:—

"It is erroneous to suppose that the legislature is beyond the control of the courts in exercising the power of eminent domain, either as to the nature of the use or the necessity to the use of any particular property. For if the use be not public, or no necessity for the taking exists, the legislature can not authorize the taking of private property against the will of the owner, notwithstanding compensation may be required."

The conclusion is, therefore, we submit, manifest that this court has jurisdiction of this writ of error.

2. The right of the plaintiff in error as a stockholder of the New Haven and Derby Railroad Company is a contract right which the Supreme Court of Errors of the State of Connecticut has by its action impaired. The statute under which the proceeding is had as construed and applied is clearly an impairment of that contract.

The stock taken is not put to any public use. Indeed it may not be put to a public use if the taker so decides,

and the only possible interest which the public have or may have is remote and indirect.

Although the defendant's holdings are small, yet the principle involved is the same as though he owned ten thousand shares, and we submit that he is entitled to the same rights as a suitor in this court as though a larger amount was involved.

EDWARD H. ROGERS,
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W. H. H. MILLER,
Of Counsel.

March 14, 1906.

APPENDIX A.

Incorporating the New Haven and Derby Railroad Company.

Resolved by this Assembly—Section 1. That Cornelius S. Bushnell, Henry Dutton, Nehemiah D. Sperry, Leonard S. Hotchkiss, Benjamin Noyes, Charles Peterson and Nathan H. Sanford, of New Haven, and William E. Downs and Robert N. Bassett, of Derby, with such other persons as shall associate with them for that purpose, are hereby constituted a body politic and incorporate by the name of the New Haven and Derby Railroad Company, and by that name may sue, be sued, plead and be impleaded in any court; and may make and have a common seal, and break, alter or renew the same at pleasure; and said corporation is hereby vested with all powers, privileges and immunities which are or may be necessary and proper to carry into effect the purposes and objects of this act, as hereinafter set forth.

Sec. 2. The capital stock of said corporation shall be five hundred thousand dollars, and may be increased at the pleasure of said corporation to any amount not exceeding the total sum of seven hundred thousand dollars, and said capital stock shall be divided into shares of one hundred dollars each.

Sec. 3. The persons named in the first section hereof, or a majority of them, shall open books to receive subscriptions to the capital stock of said corporation at such time or times, and place or places, as they or a majority of them may appoint, and shall give such notice of the times and places of opening said books as they shall deem

reasonable, and shall receive said subscriptions under such regulations as they may adopt for such purpose.

SEC. 4. The persons named in the first section hereof, or a majority of them, are hereby authorized to call the first meeting of the stockholders of said corporation in such a way, and at such time and place as they may appoint, whenever one hundred thousand dollars or more of the capital stock of said corporation shall have been subscribed for, to choose directors and perfect the organization of said corporation; and in all meetings of the stockholders of said corporation each share shall entitle the holder thereof to one vote, which vote may be given by said stockholder in person or by lawful proxy; and whenever said corporation shall have been so organized, it may proceed to commence the construction of the railroad hereinafter specified.

SEC. 5. The directors shall have full power to make and prescribe such by-laws, rules and regulations as they shall deem needful and proper (not contrary to the laws of this state, or of the United States), touching the disposition and management of the stock, property, estate and effects of said corporation, the transfer of its shares, the duties and conduct of its officers and servants, the elections and meetings of directors, and all matters whatsoever which may appertain to the concerns of said corporation.

SEC. 6. Said corporation is hereby authorized and empowered to locate, construct and finally complete a single, double or treble railroad or way from some suitable point in the town of New Haven, through the town of Orange, to some suitable point in the town of Derby, and shall have full power to equip, maintain, use and enjoy the said railroad, and to take, transport and carry property and persons thereon, by the power and force of steam, of animals, or any mechanical or other power, or of any combi-

nation of them which said corporation may choose to apply. Said corporation may purchase, receive and hold, in fee simple or otherwise, at their pleasure, such real estate as may be necessary or convenient, in order to accomplish the objects and purposes of this act, and may make any lawful contract with any other railroad company with whose road the track of said railroad may connect, in relation to the business or property of the same; and may take lease of any railroad or may lease their railroad to, or may make joint stock with any connecting railroad running in the same general direction as their said railroad.

SEC. 7. Said corporation shall have all the powers, and shall be subject to all the liabilities and restrictions conferred upon, or imposed upon railroad companies, by the statute, entitled An act in addition to an act relating to railroad companies, approved June 21, 1849, and the other statutes which have been passed in alteration of said statute, or in addition thereto; and the general railroad commissioners shall be deemed the commissioners of said road, within the meaning of said act of 1849.

SEC. 8. Whenever the land or estate of any *feme covert*, infant, *cestui que trust*, person *non compos mentis*, or person out of this state, shall be required for the purposes of said railroad, the notice to be given to such persons of a proposed laying out of said railroad, or location thereof upon said land or estate, or of an intended application by said corporation for the appointment of appraisers under the tenth section of said act of 1849, or of a proposed appraisal of said land or estate, may be such reasonable notice as shall be prescribed and ordered by some judge of the superior court; and such notice duly given in the manner so prescribed by such judge shall be deemed sufficient notice to that person. The husband of any such *feme covert*, the guardian of any such infant,

the trustee of any such *cestui que trust*, and the conservator of any such person *non compos mentis*, respectively, may in behalf of that person release all damages for any land or estate taken as aforesaid, as effectually as they might respectively do if the same were holden by them in their own right respectively.

SEC. 9. If said corporation shall not expend the sum of one hundred thousand dollars upon said railroad within three years from the passage of this act, or if they shall not construct said railroad, and put the same in operation within five years from the passage of this act, then this act shall be null and void.

SEC. 10. This act may be altered, amended or repealed at the pleasure of the general assembly.

Approved July 9, 1864.

APPENDIX B.

SECTION 3391. *Surrender of rights before beginning business.* At any time before the payment of any part of the subscriptions to capital stock, and before the commencement of business, the incorporators, and the subscribers for stock, if any, may surrender the corporate rights and the franchises of any corporation by filing in the office of the secretary of state a certificate verified by the oath of such incorporators and subscribers, that no part of such subscriptions has been paid, that such business has not been commenced, that no debts have been incurred which are unpaid, and that they surrender all the rights and franchises of such corporation. When such certificate has been examined and approved by the secretary of state the existence of such corporation shall terminate.

SECTION 3392. *Voluntary dissolution after commencing business.* Whenever the directors of a corporation shall vote to terminate its corporate existence, they shall forthwith call a special meeting of the stockholders, to be held not less than thirty nor more than forty days from the date of such call. Such call shall contain a copy of such vote and shall be published once a week for four weeks next preceding such meeting, in a newspaper of this state having a circulation in the town where such corporation is located, and a copy thereof shall be sent by mail to the last known address of each stockholder. If, at such meeting of the stockholders, three-fourths in interest of each class of stock issued shall vote to confirm such vote of the directors, the directors shall proceed

forthwith to wind up the affairs of such corporation. If every stockholder shall sign and acknowledge, before an officer authorized to take acknowledgments of deeds, an agreement among stockholders that the corporate existence of such corporation shall be terminated, the vote of the directors and the confirming vote of the stockholders aforesaid may be dispensed with.

SECTION 3393. *Directors trustees to wind up business.* The directors of a corporation, whose existence is to be terminated pursuant to the vote or assent of its stockholders, as provided in section 3392, shall be trustees to close up the business of such corporation. They shall forthwith prepare an inventory of its assets, make a list of its creditors, and collect its bills and accounts receivable. They will send a written notice of the proposed dissolution to every known creditor of such corporation, within two weeks from the date of the stockholders' vote of confirmation, or their agreement to dissolve the corporation, warning him to present his claim; and they shall also publish, in some newspaper published in this state, and having a circulation in the town where such corporation is located, a copy of such notice and warning. Such trustees may, in their discretion, bring their application to the superior court for the county within which such corporation is located, setting forth the fact of the proposed dissolution, and praying the court to limit a period within which all claims against such corporation must be presented; and such court may make an order providing for notice to all creditors of the corporation and requiring them to present their claims to such trustees within a period of four months from the date of such order, and providing that all claims not so presented within the time limited shall be barred. Any claim so presented and disallowed by such trustees shall be barred unless the owner thereof shall commence an action to enforce the same

within four months after he receives written notice of its rejection. Within one year from the date of the stockholders' vote or agreement to dissolve, as aforesaid, the trustees shall sell all of the property of such corporation except money and uncollected accounts in litigation, at public auction, if the same can not, within said year, be advantageously sold at private sale; but said court may extend the time for such sale, for cause shown, after due notice and hearing. As soon as practicable the trustees shall pay in full, or *pro rata*, all claims against such corporation which have been allowed by them, or which may be found to be due by any proper tribunal, and shall distribute the balance of the assets, if any, among the stockholders of such corporation. Nothing in section 3992 or in this section shall restrict the rights of any creditor to enforce his claim against such corporation, provided such claim is not barred by an order of court.

SEC. 30. *Directors trustees to wind up business.* The directors of a corporation whose existence is to be terminated pursuant to the vote or assent of its stockholders, as provided in section 29 of this act, shall be trustees to close up the business of such corporation. They shall forthwith prepare an inventory of its assets, make a list of its creditors with the amounts due to each, and collect its bills and accounts receivable. They shall, within two weeks after the date of the stockholders' vote of confirmation or agreement to dissolve the corporation, send a written notice of the proposed dissolution to every known creditor of such corporation warning him to present his claim and stating to whom and at what place such claim may be presented. They shall in such notice limit the time within which such claims shall be presented, which shall not be less than four months after the date of such stockholders' vote or agreement. They shall also publish in some newspaper, published in this state and having a circulation in the town where such corporation is located, a copy of such notice. Within one year from the date of such stockholders' vote or agreement the trustees shall sell all of the property of such corporation except money and uncollected accounts in litigation, at private sale or public auction. As soon as practicable the trustees shall pay, in full or *pro rata*, all claims against such corporation which have been allowed by them or which may be found to be due by any proper tribunal and shall distribute the balance of the assets, if any, among the stockholders of such corporation.

SEC. 31. *Application to the court.* Such trustees

may, in their discretion, bring their application to the superior court for the county within which such corporation is located, or to any judge of the superior court when such court is not in session, setting forth the facts of such proposed dissolution and praying the court, or such judge, to limit a period within which all claims against such corporation must be presented, and such court or judge may make an order limiting the time within which claims must be presented, which shall not be less than four months from the date of such order. Such trustees shall proceed to wind up the affairs of the corporation, in accordance with the provision of section 30 of this act, under the direction of the court in the same manner as if they were receivers. The court may, for cause shown, extend the period within which the trustees shall sell the property of the corporation.

SEC. 32. *When claims shall be barred.* All claims not presented within the time limit in accordance with the provisions of sections 30 and 31 of this act shall be barred and any claim so presented and disallowed by such trustees shall be barred unless the owner thereof shall commence an action to enforce the same within four months after such trustees shall have given him written notice of its rejection.